January 13, 2026

Assessment of Public Comment

Price Gouging

Notice of Proposed Rulemaking published February 12, 2025

ID Nos. LAW-06-25-00005-P, LAW-06-25-00006-P, LAW-06-25-00007-P, LAW-06-25-00008-P, LAW-06-25-00009-P, LAW-06-25-00010-P, LAW-06-25-000011-P

Contents

Background

On June 6, 2020, the Legislature approved and the Governor signed Chapter 90 of the Laws of 2020 (S. 8191), which amended General Business Law § 396-r, the general price gouging statute for New York State, to insert G.B.L. § 396-r(5) reading "The attorney general may promulgate such rules and regulations as are necessary to effectuate and enforce the provisions of this section."

Pursuant to this grant of authority, on March 4, 2022, the Attorney General issued an advanced notice of proposed rulemaking seeking public comment on new rules to effectuate and enforce the price gouging law.[1] In response, the Attorney General received approximately 65 comments from advocacy groups, consumers, industry representatives, and academics.[2]

Following careful consideration of these comments and with reference to the Office of the Attorney General ("OAG")'s extensive experience in administration of the statute, the Attorney General announced on March 2, 2023, her intention to publish in the State Register Notices of Proposed Rulemaking proposing seven rules effectuating and enforcing the price gouging statute.[3] At the time of the announcement the Attorney General also published a regulatory impact statement for each rule, preceded by a preamble setting out general considerations applicable to all rules ("First NPRMs").[4] The Notices of Proposed Rulemaking were published in the State Register on March 22, 2023.[5]

The Attorney General received approximately 35 comments on the proposal during the comment period.[6] Following consideration of the comments made in the First NPRMs,

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[1] Office of the Attorney General, *Attorney General James Launches Rulemaking Process to Combat Illegal Price Gouging and Corporate Greed* (March 4, 2022), https://ag.ny.gov/press-release/2022/attorney-general-james-launches-rulemaking-process-combat-illegal-price-0

[2] These comments were collected and published on the Attorney General's website (https://ag.ny.gov/sites/default/files/stopillegalprofiteering-public-comments.pdf).

[3] Office of the Attorney General, *Attorney General James Announces Price Gouging Rules to Protect Consumers and Small Businesses* (March 2, 2023), https://ag.ny.gov/press-release/2023/attorney-general-james-announces-price-gouging-rules-protect-consumers-and-small

[4] Office of the Attorney General, Notice of Proposed Rulemaking – Price Gouging, https://ag.ny.gov/sites/default/files/price_gouging_rulemaking_final_for_sapa.pdf ("First NPRMs")

[5] N.Y. St. Reg., March 22, 2023 at 21-29, *available at* https://dos.ny.gov/system/files/documents/2023/03/032223.pdf. The State Register's content is identical to that of the NPRM Preamble, save that footnotes were converted to main text (as the State Register format system does not accommodate footnotes) and a clerical error respecting rule numbering was corrected. For ease of reference, all citations to the Notice of Proposed Rulemaking will be to the First NPRMs, linked to in footnote 4, in the format First NPRMs at XX.

[6] These comments were collected and published on the Attorney General's website (https://ag.ny.gov/rulemaking-laws-price-gouging). For ease of reference, citations to the comments received on the First NPRMs will include a pincite to this document in the form First NPRM Comments at XX.

the Attorney General elected to issue seven new Notices of Proposed Rulemaking ("Second NPRMs") on largely the same topics as the First NPRMs, subject to the standard 60-day comment period for new Notices of Proposed Rulemaking.[7] The Second NPRMs attracted approximately 30 comments, of which 20 were comments from or on behalf of various businesses or groups representing businesses, and the remainder were submitted by academics, consumers, and ride-hail drivers.[8]

This Assessment of Public Comment summarizes the comments to the Second NPRM and presents a summary and an analysis of the issues raised and significant alternatives suggested by any such comments; a statement of the reasons why any significant alternatives were not incorporated into the rule; and a description of any changes made in the rules because of such comments.

Because all seven Notices of Proposed Rulemaking in the Second NPRM were published simultaneously, many commentators elected to submit comments on all seven rules at once in a single comment, and (perhaps because of that format choice) made comments that apply equally to some or all of the rules. Many commentators also made the same or very similar comments.

Although each rulemaking proposal is separate and rests on separate Regulatory Impact Statements, OAG concluded it would be more useful to commentators and the public for this Assessment of Public Comment to do as the commentors did and likewise address itself first to these general comments before assessing rule-specific comments rule-by-rule, grouping similar topics by theme, all in a single document. Finally, the sequencing of the rules as proposed in N.Y.C.R.R. and the order of the publication of their proposals in the State Register is different.

A table of correspondence is below:

State Reg Proposal #	Proposed Rule and Rulemaking
LAW-06-25-00008-P	600.1, 600.2 & 600.10: Definitions and Unconscionably Excessive Prices
LAW-06-25-00007-P	600.4: Unfair Leverage Examples
LAW-06-25-00006-P	600.5: Unfair Leverage of Market Position
LAW-06-25-00005-P	600.6: Pre-Disruption Price Determination/Dynamic Pricing (withdrawn)
LAW-06-25-00010-P	600.7: 10% Gross Disparity Threshold
LAW-06-25-00009-P	600.8: New Essential Products

[7] N.Y. St. Reg., Feb. 12, 2025 at 2-15, *available at* https://dos.ny.gov/system/files/documents/2025/02/021225.pdf.

[8] These comments were collected and published on the Attorney General's website (https://ag.ny.gov/rulemaking-laws-price-gouging). For ease of reference, citations to the comments received on the Second NPRMs will include a pincite to this document in the form Second NPRM Comments at XX.

LAW-06-25-00012-P	600.9: Cost Definition and Allocation Methods
LAW-06-25-00011-P	600.9: Geographic Scope (withdrawn)

Comments Applicable to Multiple Rules

High-level and general comments received on the NPRM are discussed here. Comments received on specific rules are discussed in the rule-by-rule analyses that follow.

General Support

Many commentators expressed broad support for the statute's purposes. The Attorney General agrees that the price gouging law is important and should be applied as the Legislature intended. Some commentators drew attention to potential instances of price gouging and urged the Attorney General to take action under the law.[9] Because these rules are of general application, these comments were treated as consumer complaints and processed by OAG's consumer mediation service.

National and International Supply Chains

Some commentators argued that it was "impractical" to apply New York's price gouging statute or the implementing regulations to sellers with nationwide scope who do not price on a state-by-state basis.[10] Other commentators argued that applying the price gouging law to national or international supply chains would disrupt those supply chains.[11]

In fact, the largest national and international enterprises, including the largest brick-and-mortar retailer in the United States—that is, those who commentators assert would have the greatest difficulty moderating their prices in this way—who are most willing to institute localized price freezes during disasters.[12] These businesses voluntarily freeze prices rather

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[9] Jesse Fehr, Second NPRM Comments at 104; Joshua Mitchell, Second NPRM Comments at 105.

[10] HDA, Second NPRM Comments at 64.

[11] FIA, Second NPRM Comments at 34.

[12] *See, e.g.*, *Jeremy Pelzer, Major Retailers Have Frozen Prices During Coronavirus Threat, AG Dave Yost Says*, CLEVELAND.COM (Mar. 12, 2020), https://www.cleveland.com/coronavirus/2020/03/major-retailers-have-frozen-prices-during-coronavirus-threat-ag-dave-yost-says.html (discussing voluntary price freezes in Ohio by Walmart, Target, Walgreens, Rite Aid, and others); Rafi Mohammed, *Why Businesses Should Lower Prices During Natural Disasters*, HARV. BUS. REV. (Sept 11, 2017), https://hbr.org/2017/09/why-businesses-should-lower-prices-during-natural-disasters ("Instead of raising prices, JetBlue capped the price of its flights leaving Florida at $99 (between nonstop cities) and $159 (for connecting flights) and added seat capacity to help people who were escaping Hurricane Irma. These prices are far below what the market would dictate, and even less than the company's typical "few days in advance" fares. AT&T, Sprint, T-Mobile, and Verizon all waived text, phone, and data overage fees in Florida due to Irma. Airbnb created a disaster response program in Texas to help provide free lodging to those who were displaced by the wreckage caused by Hurricane Harvey."); Sarah Nassauer, *Home-Improvement Retailers Scamble to Restock in Florida*, WALL ST. J. (Sept 11, 2017), https://www.wsj.com/articles/home-improvement-retailers-scramble-to-restock-in-florida-1505145492 ("Both Lowe's and Home Depot said they don't raise prices during disasters and have price-freeze policies in place").

than raise prices during an emergency even where such an increase would not run afoul of the law.

This behavior, which may emerge from the same concerns for fairness that undergird the statute, suggests that price-gouging laws are readily implementable by larger businesses with complex supply chains.

Even if different State or local price gouging laws did create inefficiencies or disruption where uniform or non-existent price gouging laws would not, the uniformity problem arises because of the statute, not the regulations. And even if the regulations exacerbated state-by-state divergence, "[c]ompanies that choose to sell products in various States must normally comply with the laws of those various States."[13]

Indeed, as compared with divergent pork production standards,[14] compliance with divergent state price gouging laws is straightforward: businesses should not *increase* prices except to cover documented increased costs or erosions in margins. The regulations also facilitate some cross-border compliance, by, for example, aligning New York's gross disparity threshold with New Jersey's, as discussed in the Assessment to rule 600.7.

Proposed Industry Carve-Outs

Commentators representing the wireless telecommunications industry, independent grocery stores, and airlines sought a blanket exception from the price gouging laws for their industries.[15] The Attorney General rejected these proposals because the statute does not allow them. The statute applies to "all parties within the chain of distribution" for essential products, and declares itself applicable to "*any* other essential goods and services used to promote the health or welfare of the public."[16]

Airlines for America argues the price gouging statute is preempted by the Airline Deregulation Act of 1978 ("ADA"),[17] and requested that the rulemaking "explicitly confirm that these rules are not applicable to air carrier pricing."[18] CITA—The Wireless Association®, similarly argues that "attempting to regulate wireless rates is expressly and implicitly preempted by the federal Communications Act of 1934," specifically 47 U.S.C.

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[13] *Natl. Pork Producers Council v. Ross*, 598 U.S. 356, 364 (2023).

[14] *Pork Producers*, 598 U.S. at 367–68

[15] *See* National Supermarket Association, Second NPRM Comments at 38-39; A4A, Second NPRM Comments at 69-70; CITA, Second NPRM Comments at 86-95.

[16] G.B.L. § 396-r(2)(d)(iii) (emphasis added).

[17] 49 U.S.C. § 41713.

[18] A4A, Second NPRM Comments at 69-70.

§ 332(c)(3)(A) ("FCA"),[19] and requests an analogous clarification. The Attorney General rejected these proposals and does not opine on the question of whether the ADA or FCA has such preemptive effect. If the ADA or FCA preempt the price gouging statute, they do so as a matter of federal law and no regulation is necessary.[20] As a general matter, regulated industries must determine the laws and regulations by which they are governed and comply with them.

The Attorney General does not agree with the National Supermarket Association's comment that independent supermarkets can or should be carved out of the statute by regulation. As noted above, the statute applies to such supermarkets, which indisputably sell essential products and, by their own admission, "operate locations in underserved neighborhoods that have been abandoned by large chain stores" that are particularly vulnerable to price gouging.[21] Although such supermarkets may have only limited control over wholesale price increases, such price increases may be passed on without liability; when prices are increased by the supermarket *without* corresponding cost increase, price gouging scrutiny is appropriate.

Vagueness of Statutory Terms

The American Petroleum Institute, Consumer Brands Association, and others commented that some or all of the statute was problematically vague.[22] Opinions among the commentators were divided as to whether the degree of ambiguity in the statutory terms simply created compliance difficulties that regulation should address, or was so serious as to render the entire statute unconstitutional, rendering any regulations made thereunder invalid.

The Attorney General agrees that the statutory purposes would be advanced by further elaboration of the statutory standards to make their application still more precise. This is why the Legislature gave the Attorney General rulemaking authority and why the Attorney General has exercised that authority in this rulemaking.

As for the statute's constitutionality, the New York Supreme Court Appellate Division held the statute was not unconstitutionally vague in the manner suggested by commentators in *People v. Quality King Distributors Inc*.[23] In that case, the defendant

[19] CITA, Second NPRM Comments at 87.

[20] Specifically with regards to CITA, if it is correct that wireless prices fall uniformly across the trade area during periods of disruption, *see* CITA, Second NPRM Comments at 89-90, then its activities would never trigger enforcement under the price gouging statute in any case.

[21] NSA, Second NPRM Comments at 38-39.

[22] *See* CBA, Second NPRM Comments at 41; API, Second NPRM Comments at 72-74.

[23] 209 A.D.3d 62, 81-83 (1st Dep't 2022).

argued that the "unconscionably extreme" standard for prices in the statute and the beginning and end dates of a statutorily-triggered abnormal market disruption were unconstitutionally vague. The Court rejected that argument:

> the statutory phrases to which Quality King takes constitutional exception provide people of ordinary intelligence a reasonable opportunity to understand the conduct General Business Law § 396-r prohibits, and none of those phrases encourages arbitrary and discriminatory enforcement (*see generally Two Wheel Corp*., 128 AD2d at 510). To be sure, General Business Law § 396-r does not contain a quantitative metric for ascertaining whether a given price is unconscionably excessive or unconscionably extreme (or whether a given disparity between two prices is gross) (cf. General Business Law § 396-rr [milk price-gouging statute]). The absence of such a metric, however, does not affect the statute's constitutionality (*see Matter of Slocum v. Berman*, 81 AD2d 1014, 1015 [4th Dept 1981] [the void-for-vagueness doctrine does not require impossible standards of specificity that would unduly weaken and inhibit a regulating authority], *appeal dismissed* 54 NY2d 752 [1981])[24]

In rejecting the vagueness challenge, the First Department joined the trial judge in that case as well as every other court to have ever considered the question.[25] API acknowledges this precedent but argues the Attorney General must disregard it because it is, in API's opinion, wrongly decided.[26] Appellate Division opinions are binding statewide until they are reviewed by the Appellate Division or a higher court.[27]

Even setting aside the preclusive effect of *Quality King*, the statute is not unconstitutionally vague. Legislative enactments like G.B.L. § 396-r are subject to an

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[24] *Quality King*, 209 A.D.3d at 83.

[25] *See, e.g.*, *People v. Two Wheel Corp*., 128 A.D.2d 507, 510 (2d Dept 1987) (rejecting constitutional vagueness attack on term "unconscionably excessive"), *aff'd*, 71 N.Y.2d 693 (1988); *State v. Strong Oil Co., Inc*., 105 Misc.2d 803, 818, 825 (Sup. Ct., Suffolk County 1980) (same, for "unconscionably excessive" and "abnormal disruption of the market"); *see also People v. Chazy Hardware, Inc*., 176 Misc.2d 960, 965 (Sup. Ct., Clinton County 1998) (rejecting a more general vagueness attack on the statute); *see also Union Sq. Supply Inc. v. De Blasio*, 572 F.Supp.3d 15, 23 (S.D.N.Y. 2021) (rejecting vagueness attack on New York City price gouging law); *State ex rel. Hood v. Louisville Tire Ctr., Inc*., 55 So.3d 1068, 1073 (Miss. 2011) (rejecting vagueness challenge to similar Mississippi law: "comprehending the nature of the conduct prohibited by the Price-Gouging Statute requires neither an advanced degree from the Wharton Business School nor an accounting degree from one of our fine public universities.").

[26] API, Second NPRM Comments at 72-75.

[27] *See Shoback v. Broome Obstetrics & Gynecology, P.C.*, 184 A.D.3d 1000, 1001 (3d Dep't 2020); *Phelps v. Phelps*, 128 A.D.3d 1545, 1547 (4th Dep't 2015); *D'Alessandro v. Carro*, 123 A.D.3d 1, 6 (1st Dep't 2014); *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 664 (2d Dep't 1984) (Titone, J.).

"exceedingly strong presumption of constitutionality."[28] Any claim of "unconstitutionality must be demonstrated beyond a reasonable doubt."[29] To demonstrate that a statute like G.B.L. § 396-r is unconstitutionally vague, it must be shown, beyond a reasonable doubt, that the statute "fails to provide a person of ordinary intelligence with a reasonable opportunity to know what is prohibited" and "is written in a manner that permits or encourages arbitrary or discriminatory enforcement."[30]

Where, as here, the statute regulates commercial activity, "the standard of ordinary intelligence is one of ordinary commercial knowledge," i.e., "the statute must be sufficiently definite so as to inform one possessing ordinary commercial knowledge of what is prohibited."[31] It has never been shown, either in the commentators' submissions or in decades of litigation, that G.B.L. § 396-r fails to provide a business with ordinary commercial knowledge a reasonable opportunity to know what conduct is prohibited.

The cases quoted by commentators are either inapposite or not to the contrary. The dicta in *United States v. Addyston Pipe & Steel Co.* and *United States v. Trenton Potteries Co*. criticizing, in the former, a hypothesized statute barring competition when it was not "in the public interest" and in the latter, a potential statute penalizing price-fixing when it was not "reasonable"—addressed statutory constructions that lack the definitiveness of G.B.L. § 396-r.[32] And since *Addyston*, the U.S. Supreme Court and the New York Court of Appeals have repeatedly rejected vagueness challenges to laws that, like the price gouging law, sought to restrain unjust or unconscionable practices in the marketplace.[33]

Meanwhile, *Johnson v. United States* and *United States v. L. Cohen Grocery Co*., also cited by commentators, are both cases treating criminal statutes.[34] Courts apply "a more

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[28] *See Lighthouse Shores v. Town of Islip*, 41 N.Y.2d 7, 11 (1976).

[29] *Id*.; *accord Amazon.com, LLC v. New York State Dept. of Taxation & Fin*., 81 A.D.3d 183, 194 (1st Dep't 2010), *aff'd sub nom. Overstock.com, Inc. v. New York State Dept. of Taxation & Fin*., 20 N.Y.3d 586 (2013).

[30] *See Ulster Home Care v. Vacco*, 96 N.Y.2d 505, 509 (2001) (quoting *People v. Foley*, 94 N.Y.2d 668, 681 (2000)).

[31] *Matter of State v. Strong Oil Co*., 105 Misc. 2d 803, 821 (Sup. Ct. Suffolk County 1980) (addressing G.B.L. § 396-r) (quoting *Governor of State of Md. v. Exxon Corp.,* 279 Md. 410, 454 (1977)), *aff'd*, 87 A.D.2d 374 (2d Dep't 1982).

[32] *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898); *United States v. Trenton Potteries Co*., 273 U.S. 392, 398 (1927).

[33] *See, e.g.*, *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 249-50 (1922) (ban on "unjust and unreasonable" rents not vague); *People ex rel. Durham Realty Corp. v. La Fetra*, 230 N.Y. 429, 449-50 (1921) (same); *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp*., 299 U.S. 183, 196 (1936) (requirement of "fair and open competition" not vague); *see also United States v. Natl. Dairy Products Corp*., 372 U.S. 29, 33 (1963) (penalties for "unreasonably low prices" not vague).

[34] *Johnson v. United States*, 576 U.S. 591, 602 (2015); *United States v. L. Cohen Grocery Co*., 255 U.S. 81, 89 (1921).

stringent analysis when examining laws that impose criminal penalties because the consequences of imprecision are qualitatively more severe."[35]

The API comments that this heightened criminal vagueness standard ought to be applied because of "significant opprobrium and stigma attached to being a price gouger . . . and because the 'statute is capable of reaching expression sheltered by the First Amendment,'"[36] pointing to the U.S. Supreme Court's decision in *Reno v. Am. C.L. Union*,[37] and the Second Circuit's decision in *VIP of Berlin, LLC v. Town of Berlin*.[38] The Attorney General does not agree.

The U.S. Supreme Court grounded its decision in *Reno* on two points: "first, the [act at issue in that case] is a content-based regulation of speech . . . second, [it] is a criminal statute."[39] Neither are true here. G.B.L. § 396-r is a civil statute. And the U.S. Supreme Court has already held that a "typical price regulation . . . for example, a law requiring all New York delis to charge $10 for their sandwiches" does not even *implicate* the First Amendment because "the law's effect on speech would be only incidental to its primary effect on conduct, and it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[40]

Neither *Reno* nor *VIP Berlin* provide that a law that imposes "opprobrium and stigma" on a business is subject to heightened review: *VIP Berlin* also concerned a speech regulation (there, a restriction on stores that sold "adult" *content*), while *Reno* concerned a criminal statute.[41] Many statutes penalize fraud above and beyond common law definitions of that term, but despite any social opprobrium associated with being labelled as a "fraud," the relaxed vagueness standard has been held to apply to such statutes.[42]

Finally, the Attorney General does not accept the argument that a statute can be saved from vagueness only if it is interpreted to follow the common law. Even when applying the more stringent analysis applicable to criminal laws, the U.S. Supreme Court upheld the

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[35] *Thibodeau v. Portuondo*, 486 F.3d 61, 66 (2d Cir. 2007) (Sotomayor, J.).

[36] API, Second NPRM Comments at 74 n. 3; *citing Reno v. ACLU*, 521 U.S. 844, 872 (1997); *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 186 (2d Cir 2010); and *Expressions Hair Design v. Schneiderman*, 581 U.S. 37 (2017).

[37] 521 U.S. 844 (1997).

[38] 593 F.3d 179, 182 (2d Cir. 2010).

[39] 521 U.S. at 872.

[40] *Expressions Hair Design*, 581 U.S. at 47 (quoting *Rumsfeld v. Forum for Academic and Institutional Rights,* 547 U.S. 47, 62 (2006)). *See Union Square Supply Inc. v. De Blasio*, 572 F. Supp. 3d 15, 22 (S.D.N.Y. 2021) ("the Price Gouging Rule does not implicate Union Square Supply's First Amendment rights").

[41] *Reno*, 521 U.S. at 872; *VIP of Berlin*, 593 F.3d at 182.

[42] *See People v. Gen. Motors Corp*., 120 Misc. 2d 371, 375 (Sup Ct, New York County 1983).

criminal penalties in the Sherman Act against a vagueness challenge not because it incorporated the common law of restraint of trade but because the common law *itself* was "full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree."[43]

"Question of Law for the Court"

Several commentators argued the provision of G.B.L. § 396-r(3) that "whether a price is unconscionably excessive is a question of law for the court"[44] precludes all Attorney General rulemaking on any subject relating to unconscionably excessive prices.

The Attorney General disagrees. The phrase "question of law for the court," when applied to an element of a civil statute, is a term of art that means that a judge and not jury decides the issue if it is litigated, and that the determination can be appealed to the Court of Appeals as that Court's jurisdiction is limited to "questions of law."[45] It does not mean, and has never been held to mean, that rulemaking on a question of law for the court is precluded. Indeed, "[t]he general administrative law principle is that a regulation adopted in a legislative rule-making proceeding . . . can apply to foreclose litigation of issues in any individual adjudicatory proceeding provided for under the enabling legislation."[46]

Thus, for example, no case has held that Statute Law § 77, which provides that the "construction of a statute is a question of law for the court" outlaws regulations construing statutes. Reading the "questions of law for the court" language to preclude rulemaking would also render the adoption of G.B.L. § 396-r(5) either partially or wholly ineffective, and

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[43] *Nash v. United States*, 229 U.S. 373, 377-78 (1913) (Holmes, J.) (rejecting vagueness challenge to the Sherman Act, which also requires market definition). In the century since *Nash*, "several courts that have considered whether Section 1 of the Sherman Act is unconstitutionally vague. All have concluded it is not." *United States v. Dornsbach*, No. 22-cr-00048, 2023 WL 2252580, at 5-6 (D. Minn. Feb. 17, 2023) (reviewing *Nash* in light of the ensuing 100 years of developments in vagueness doctrine).

[44] *See, e.g.*, BCNYS, Second NPRM Comments at 26-27; API, Second NPRM Comments at 75-76, 82; *see also* CBA, Second NPRM Comments at 41 (asserting that "the proposed rulemaking . . . provid[es] interpretations that should be left to a court").

[45] N.Y. Const., art. VI § 3(a). *See, e.g.*, *White v. Cont. Cas. Co.*, 9 N.Y.3d 264, 267 (2007) ("unambiguous provisions of an insurance contract must be given their plain and ordinary meaning . . . and the interpretation of such provisions is a question of law for the court"); *Silsdorf v. Levine*, 59 N.Y.2d 8, 13 (1983) ("Whether [allegedly defamatory] statements constitute fact or opinion is a question of law for the court to decide"); *Hedges v. Hudson R.R. Co.*, 49 N.Y. 223, 223 (1872) ("the question as to what is reasonable time for a consignee of goods to remove them after notice of their arrival, where there is no dispute as to the facts, is a question of law for the court. A submission of the question to the jury is error, and, in case the jury finds different from what the law determines, it is ground for reversal.").

[46] *Chem. Specialties Mfrs. Ass'n v. Jorling*, 85 N.Y.2d 382, 391 (1995).

the courts "decline to read [an] amendment in such a way as to render some of its terms superfluous."[47]

The principal statutory term to which this comment is directed was the phrase "unfair leverage." The Business Council comments that it is unlawful to propose a rule establishing criteria for unfair leverage because "'unfair leverage' is not an independent standard but *one* of the factors that a court *may* consider to find a price to be 'unconscionably excessive.'"[48]

This comment misreads the statute, which provides that the "court's determination that a violation of this section has occurred *shall* be based on *any* of the following factors . . . that there was an exercise of unfair leverage *or* unconscionable means; or . . . a combination of both factors [listed] in this paragraph."[49] Absent the establishment of a prima facie case under G.B.L. § 396-r(3)(b), a finding of unfair leverage is sufficient to establish a violation of the statute; otherwise the statutory text permitting a finding based on a "combination of both factors" would be superfluous. It would be an abuse of discretion for a court to refuse to consider unfair leverage if evidence thereof were properly before it.[50]

Finally, rules 600.6 through rule 600.9 concern the interpretation of G.B.L. § 396-r(3)(b), which sets out two paths by which a court *must* conclude that the statute has been violated if the showing presented is not rebutted.[51] Here too there is no suggestion that the phrase "question of law for the court" disables rulemaking.

Scope of Attorney General's Rulemaking Power

Certain commentators argued that the rules exceeded the Attorney General's statutory rulemaking powers or violated "the State non-delegation doctrine."[52]

The Attorney General disagrees that the statute violates the State non-delegation doctrine. As the Court of Appeals repeated only two years ago, "'the Legislature may

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[47] *Matter of OnBank & Trust Co*., 90 N.Y.2d 725, 731 (1997); *see also* McKinney's Cons Laws of NY, Book 1, Statutes § 144 ("Statutes will not be construed as to render them ineffective").

[48] BCNY Comment, Second NPRM Comments at 27 (emphasis in original).

[49] G.B.L. § 396-r(3)(a) (emphasis supplied).

[50] *Gall v. United States*, 552 U.S. 38, 51 (2007) (listing failure to consider a statutory factor as an example of an abuse of discretion).

[51] G.B.L. § 396-r(3)(b) ("In *any* proceeding commenced pursuant to subdivision four of this section, prima facie proof that a violation *of this section* has occurred *shall* include evidence…" (emphasis added)).

[52] CBA, Second NPRM Comments at 41; API, Second NPRM Comments at 75-85. The comment to this effect made by the Consumer Brands Association provides no explanation as to how the rules exceed the Attorney General's constitutional authority. The remainder of this Assessment tracks the comments that do provide such an explanation. Insofar as the CBA's comment concerns the role of a court, it is addressed in the "question of law for the court" section above.

constitutionally confer discretion upon an administrative agency [or a commission] . . . if it limits the field in which that discretion is to operate and provides standards to govern its exercise.'"[53] Here, the Legislature has provided clear standards to govern the exercise of the Attorney General's rulemaking functions, and the articulation of more precise elaboration on broader standards is what rulemaking is for.

Commentators argue that the presence of factors contributing to the establishment of an unconscionably excessive price in the statutory text bars rulemaking that seeks to further define those factors, such as 10% being the presumptive gross disparity threshold or means of accounting for costs in a rebuttal showing.[54] But the proposed rules do not "add a requirement that does not exist under the statute."[55] Instead, they "promulgate rules to further the implementation of the law as it exists."[56] As the Court of Appeals explained:

> it is not necessary that the Legislature supply administrative officials with rigid formulas in fields where flexibility in the adaptation of the legislative policy to infinitely variable conditions constitute the very essence of the programs . . . stated differently, where flexibility is required to enable an administrative agency to adapt to changing conditions, it is sufficient if the Legislature confers broad power upon the agency to fulfill the policy goals embodied in the statute, leaving it up to the agency itself to promulgate the necessary regulatory details.[57]

The inclusion of the courts in the statute's enforcement mechanisms does not change the analysis. "Under settled principles of administrative law, a regulation adopted in a legislative rule-making proceeding can indeed foreclose litigation of issues in later statutorily required individual adjudicatory proceedings . . . 'Indeed, this may be the single most important effect of legislative rules.'"[58] Here, the Attorney General is exercising express statutory authority to "determine issues that do not require case-by-case

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[53] *Stevens v. New York State Div. of Crim. Just. Servs*., 40 N.Y.3d 505, 517 (2023) (quoting *Matter of Levine v. Whalen*, 39 N.Y.2d 510, 515 [1976]).

[54] Commentators cited *Kahal Bnei Emunim v. Town of Fallsburg*, 78 N.Y.2d 194, 204 (1991) and *Matter of Tze Chun Liao v. N.Y. State Banking Dep't*, 74 N.Y.2d 505, 510 (1989) as the principal cases supporting these propositions.

[55] *Kahal Bnei Emunim and Talmud Torah Bnei Simon Israel v. Town of Fallsburg*, 78 N.Y.2d 194, 204 (1991).

[56] *Ibid*. (quoting *Matter of McNulty v. State Tax Comm'n,* 70 N.Y.2d 788, 791 (1987)).

[57] *Juarez v. New York State Off. of Victim Servs*., 36 N.Y.3d 485, 491–92 (2021) (quoting *Matter of Nicholas v. Kahn,* 47 N.Y.2d 24, 31 (1974) and *Matter of Consolidated Edison Co., of N.Y*. 71 N.Y.2d 186, 191 (1988)).

[58] *Matter of Chem. Specialties Mfrs. Ass'n v. Jorling*, 85 N.Y.2d 382, 390-91 (1995) (quoting 1 Davis and Pierce, Administrative Law § 6.5, at 250 [3d ed])

consideration" rather than "continually relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding."[59]

Rules are *ultra vires* only when they add to the statute "rule[s] *out of harmony* with the statute."[60] Indeed, the cases cited by commentators where courts struck down disharmonious rules merely underscore the differences between the regulations challenged there and the regulations proposed here.

In *Matter of Tze Chun Liao v. N.Y. State Banking Dep't*, the statutory criteria for the award of cashier licenses that the agency was required to effectuate included "financial responsibility, experience, character, and general fitness of the applicant" as well as promotion of "the convenience and advantage of the area."[61] The regulation challenged in *Tze Chun Liao* introduced not just a new concept—that a license should not be issued if it would cause "destructive competition"—but a concept that *contradicted* the legislative purpose: to give "consumers . . . broader access to cash their weekly paychecks without being subjected to a more tightened marketplace in the grip of already powerful suppliers benefited by the 'destructive competition' standard."[62] By contrast, no regulation proposed here contradicts the legislative intent of "prevent[ing] any party within the chain of distribution of any goods [or services] from taking unfair advantage of the public during abnormal disruptions of the market."[63]

Likewise, a regulation requiring tax-exempt entities to file an application to qualify for a property tax exemption was struck down in *Kahal Bnei Emunim v. Town of Fallsburg* because the rule was inconsistent with statutory text permitting an exemption to be provided without an application.[64] Meanwhile in *Freitas v. Geddes Sav & Lona Ass'n*, the challenged banking regulation purported to exempt the fact-finder from needing to find usurious intent despite statutory text requiring the fact-finder to do just that.[65] These price gouging rules, by contrast, provide more detailed definitions of preexisting statutory concepts in an effort to effectuate the statute and in no way are inconsistent with statutory text.

Indeed, the Court of Appeals has endorsed rulemaking to supplement common-law concepts embedded in statutory terms. In *People v. Wells Fargo Ins. Servs., Inc.*, the Attorney General sued an insurance brokerage for a breach of an asserted common-law fiduciary duty, alleging that the brokerage improperly failed to disclose certain compensation

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[59] *Id*. at 391 (cleaned up).

[60] *Jones v. Berman*, 37 N.Y.2d 42, 53 (1975) (emphasis added).

[61] *Matter of Tze Chun Liao v. N.Y. State Banking Dep't*, 74 N.Y.2d 505, 510 (1989) (quoting Banking L. § 369(1)).

[62] *Id*. at 508-11.

[63] G.B.L. § 396-r(1).

[64] *Kahal Bnei Emunim v. Town of Fallsburg*, 78 N.Y.2d 194, 203 (1991).

[65] *Freitas v. Geddes Sav & Lona Ass'n*, 63 N.Y.2d 254, 264 (1984).

to its clients.[66] While acknowledging that nondisclosure may be unscrupulous, the Court rejected the Attorney General's claims, reasoning that the brokerage was under no common-law duty to disclose.[67] The Court, however, noted that the "better way" of ending the "questionable" practice of nondisclosure was to promulgate a regulation—such as the one promulgated by the Insurance Department (predecessor to DFS) after the conduct in question—setting forth disclosure requirements over and above those required by the common law.[68] So too here, as the Attorney General seeks to provide certainty for businesses and consumers by defining with greater precision what constitutes price gouging as that term is defined by the statute and what does not.[69]

Regarding comments arguing that any of the regulations violate the doctrine announced in *Boreali v. Axelrod*,[70] the Court of Appeals has recently clarified that *Boreali* "has no application" where the statute at issue does not contain an "exceedingly broad and nonspecific grant . . . of authority."[71] In G.B.L. § 396-r, "[f]ar from a standardless or overly amorphous grant of authority of the sort at issue in *Boreali*, the legislature expressly defined the limited sphere in which the [regulatory body] was authorized to promulgate regulations."[72] The Attorney General must promulgate regulations that "effectuate and enforce" the statutory text, and that text contains an express declaration of legislative policy as well as detailed definitions of each of the statute's major operative terms. These regulations may only, and only do, fill in the details of the existing regulatory scheme, just as the Commission's regulations in *Stevens* did.

That the remaining statutory terms may contain some degree of ambiguity does not change this analysis: statutory "standards or guides need only be prescribed in so detailed a fashion as is reasonably practicable in light of the complexities of the particular area to be regulated."[73] "Indeed, in many cases, the Legislature has no alternative but to enact statutes in broad outline, leaving to administrative officials enforcing them the duty of arranging the details."[74]

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[66] *People v. Wells Fargo Ins. Servs., Inc.*, 16 N.Y.3d 166, 169-70 (2011).

[67] *Id*. at 171.

[68] *Id*. at 171-72.

[69] *See, e.g.*, *Perry Thompson Third Co. v. City of New York*, 279 A.D.2d 108, 116 (1st Dept 2000) (approving Water Board's adoption of a definition of an undefined term in the statute).

[70] 71 N.Y.2d 1 (1987).

[71] *Stevens v. New York State Div. of Criminal Justice Services*, 40 N.Y.3d 505, 516 n. 3 (2023) (referencing Public Health Law § 225(5)(a), at issue in *Boreali*, which empowered the Public Health Council to "deal with any matters affecting . . . the public health").

[72] *Id.* at 522.

[73] *Matter of Levine v. Whalen*, 39 N.Y.2d 510, 515 (1976).

[74] *Ibid*.

Even if *Boreali* were applicable, the Attorney General comments it satisfied here. Under *Boreali*, the test for whether an agency engaged in permissible interstitial rulemaking asks whether the agency (i) "used its expertise and understanding" to achieve a legislative objective instead of a "value judgment" reflecting "complex policy decisions" beyond its mandate; (ii) filled in the details of a broad policy goal set by the Legislature, instead of writing on a "clean slate"; (iii) acted on an issue that has not been the topic of substantial public debate, instead of taking upon itself to regulate matters on which the Legislature already tried, and failed, to set policy; and (iv) relied on its special competence and expertise in the field, instead of not doing so.[75]

Begin with the second factor. In G.B.L. § 396-r, not only has the Legislature articulated its policy goal in G.B.L. § 396-r(1), but it has also delegated "broad power" to the Attorney General to "implement related regulations" in G.B.L. § 396-r(5)— "[o]f critical relevance" to the *Boreali* analysis.[76] The proposed regulations provide more detail on certain elements of the statute's prohibitions by specifying how parties might satisfy or not satisfy the various criteria for an "unconscionably excessive price." They are "directly tied to a specific goal dictated by the Legislature."[77]

Although the statute itself does not lay out these details, the separation-of-powers doctrine "does not require that the agency be given rigid marching orders."[78] Indeed, the Court of Appeals explained that "an agency may promulgate regulations not specifically directed by its enabling legislation as long as they are consistent with and [are] intended to advance the legislature's broad policy choice."[79] The regulations here follow the specific direction of the Legislature to effectuate and enforce the specific provisions of the statute.

The first and fourth *Boreali* factors ask whether an agency "used its expertise and understanding" to achieve a legislative objective, or whether it instead made a "value judgment" reflecting "complex policy decisions" beyond its mandate.[80] Here, the proposed regulations satisfy both of those factors because it was the product of the Attorney General's technical expertise, crafted to ensure the exclusion of a specific class of unconscionable conduct from the marketplace—an issue in the heartland of the Attorney General's legislative mandate since at least 1956, when the Legislature tasked the Attorney General with "enjoining the continuance of . . . persistent fraud or illegality in the carrying on,

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[75] *LeadingAge*, 32 N.Y.3d at 261, 264-67; *but see id*. at 284-86 (Wilson, J., dissenting) (reviewing cases suggesting that expertise factor has ceased to play an important part in *Boreali* analysis).

[76] *Id*. at 262; *see also Garcia v. New York City Dept. of Health & Mental Hygiene*, 31 N.Y.3d 601, 613 (2018) (considering "delegat[ion] [of] significant power" to agency in the second prong of *Boreali* analysis).

[77] *LeadingAge*, 32 N.Y.3d at 263.

[78] *Id.* at 260.

[79] *Id.* at 264.

[80] *Id*. at 263-64; see *Boreali*, 71 N.Y.2d at 11-14.

conducting, or transaction of business,"[81] and perhaps as early as the 1899 adoption of the Donnelly Act, which at that time empowered the Attorney General and only the Attorney General to eliminate unlawful restraints of trade.[82]

In applying that expertise the Attorney General has considered the costs and benefits of the regulations. But "the promulgation of regulations necessarily involves an analysis of societal costs and benefits.."[83] That OAG "determined the exact means of achieving and advancing the larger end chosen by the legislature . . . is a necessary part of the [OAG's] exercise of its regulatory authority; it does not give rise to a violation of the separation of powers doctrine."[84] The test is whether the Attorney General "balance[ed] costs and benefits according to preexisting guidelines" rather than creating "its own comprehensive set of rules without benefit of legislative guidance."[85]

Here, the Legislature has provided copious preexisting guidelines: it has set out an express purpose of "prevent[ing] any party . . . from taking unfair advantage of the public during abnormal disruptions of the market,"[86] defined price gouging in measured terms, and then added more definition to each of those terms with a statutory invitation for rulemaking to further fill in the details. By so doing, the Legislature has delineated the values that must be balanced and the range of meanings into which the regulations must fit.

In selecting from between the options permitted by the legislative scheme, the Attorney General was appropriately guided by OAG's expertise. The OAG reviewed thousands of consumer complaints of price gouging, over a century of experience in anti-monopolization enforcement activity, and a large fraction of the available economic literature on price gouging specifically as well as its own analysis of market activity. These rules reflect OAG's deep, substantive engagement with the problem of price gouging as one might expect from the agency exclusively entrusted with enforcement of the price gouging statute,[87] while staying strictly within the bounds of the detailed legislative scheme.

Although of "limited probative value," the third *Boreali* factor— "whether the legislature has unsuccessfully tried to reach agreement on the issue"—is also satisfied

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[81] L. 1956, Ch. 592.

[82] L. 1899, Ch. 690. API declares that "no special expertise or technical competence in the field of economics was involved in the development of the proposed rule," API, Second NPRM Comments at 76-77. The regulations reflect the contributions of OAG's current and former chief economists and the many experts in OAG's Research and Analysis Division. This comment does not account for the Staff Report that accompanies the present rulemaking and sets out OAG's economic analysis.

[83] *Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dept. of Health and Mental Hygiene*, 23 N.Y.3d 681, 697 (2014).

[84] *Garcia*, 31 N.Y.3d at 612.

[85] *Garcia*, 31 N.Y.3d at 609.

[86] G.B.L. § 396-r(1).

[87] G.B.L. § 396-r(4).

here.[88] This factor weighs against a regulation only in the event of "'repeated failures by the legislature to reach an agreement' on the [regulation's] subject matter 'in the face of substantial public debate and vigorous lobbying by a variety of interested factions.'"[89] Here, the proposed bills identified by commentators "never cleared their respective committees, a situation hardly indicative of the 'vigorous debate' referred to in the third *Boreali* factor."[90]

In short, the Attorney General does not believe that *Boreali* is implicated in these regulations. If it is, *Boreali* would nonetheless be satisfied as to both the original proposed regulations and the present revised regulations.

Regarding comments that it violates constitutional due process for the executive branch to adopt rules that elaborate on statutory definitions,[91] OAG is aware of no case that has held that the executive branch is inhibited from adopting regulations on due process grounds because that same executive branch will then seek to enforce those regulations in court.

Williams v. Pennsylvania, cited by the API, concerned the separate question of whether a *judge* who had formerly been a prosecutor could participate *as a judge* in the same case in which he served as a prosecutor; the specific requirement that no person "can be a judge in his own case" (there applied literally) compelled the result that the judge in question was required to recuse himself.[92] Here, the Attorney General may only bring proceedings for noncompliance with the statute through a judicial proceeding in front of—as *Williams* requires—a neutral magistrate. That the same executive branch that makes regulations also brings prosecutions does not violate due process.

Application of Price Gouging Laws to "Dynamic Pricing"

Some commentators argued that the price gouging laws should not be applied to "dynamic pricing," on the grounds that applying price gouging laws to "dynamic pricing" would undermine its public benefit of matching supply and demand, or was so complex as to be beyond regulatory comprehension.[93]

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[88] *Matter of Acevedo v. New York State Dept. of Motor Vehicles*, 29 N.Y.3d at 224-25; *see Boreali*, 71 N.Y.2d at 13.

[89] *Garcia*, 31 N.Y.3d at 615 (quoting *Boreali*, 71 N.Y.2d at 13).

[90] *Roman Catholic Diocese of Albany v. Vullo*, 185 A.D.3d 11, 20 (3d Dep't 2020) (citing *Leading Age*, 32 N.Y.3d at 265-66), *vacated on other grounds*, 142 S.Ct 421 (2021); *see also Stevens*, 40 N.Y.3d at 522 n.8 ("We are very reluctant to consider subsequent failed legislation to interpret the meaning of a statute").

[91] API, Second NPRM Comments at 77; citing *Williams v. Pennsylvania*, 579 U.S. 1, 9 (2016).

[92] *Williams*, 579 U.S. at 9.

[93] *See, e.g.*, Michael Giberson, Second NPRM Comments at 14-15; API, Second NPRM Comments at 74-75.

The statute makes no distinction between dynamic and other pricingand so the law and rules apply with equal force no matter what pricing method a seller employs.

In the specific context of High-Volume For Hire Ground Transportation Services ("HVGTs"), e.g. Uber and Lyft, rapid price fluctuations during emergencies is justified by these businesses on the grounds that, for example, drivers require additional compensation to incentivize them to take rides at those times.[94] In this case, any portion of a surcharge paid by passengers that is passed on to drivers would not run afoul of the law.

In the same way, for any increase in the price charged above the benchmark price, regulated entities using "dynamic pricing" must account for any and all increase in prices as allowable additional costs.[95] By expressly allowing sellers to charge higher prices to recover higher costs but not to increase net profits, the price gouging statute improves alignment of prices and supply during times of disruption.

At this time, the Attorney General withdraws the proposed rule addressing pre-disruption benchmark price for both dynamic and non-dynamic pricers (proposal LAW-06-25-00005-P). The Attorney General intends to propose rules addressing the same considering both comments made on the prior proposal and recent developments in dynamic pricing activity and regulation. Commentors on this rulemaking will receive notice when that notice of proposed rulemaking is published. The Attorney General reminds regulated entities that price gauging laws apply regardless of a seller's pricing method and withdrawal of this proposal does not suspend their obligations under the law.

Effect of Regulations on Ride-Hailing Drivers

OAG received several comments from ride hailing drivers, as well as a comment from the Independent Drivers Guild, all generally on the question of the impact of the regulations on driver earnings.

Certain individual drivers claimed that the rules would diminish driver earnings.[96] The Independent Drivers Guild, which represents over 100,000 drivers, disagreed, noting that in

[94] Comment of Uber Technologies, Inc., First NPRM Comments at 110-11; Comment of Lyft, Inc., First NPRM Comments at 127-28.

[95] Comment of New York Taxi Workers' Alliance, First NPRM Comments at 29-31; *see also* Lyft, Second NPRM Comments at 118 (guaranteeing that weekly diver pay would capture only 70% of "rider payments after external fees").

[96] *See, e.g.*, adamestravelr@gmail.com, Second NPRM Comments at 97 ("stop making rules to treated our way of life to support our families, please stop 😡"); Edward Sosa, Second NPRM Comments at 98 ("We taxi drivers can't stand any more regulations or any more rate cuts. Please be considerate."); Hyueongseok Seo, Second NPRM Comments at 103 ("I oppose [the regulations]"); Kevin Renczkowski, Second NPRM Comments at 106

response to its comments in the last round of proposed rulemaking, "the current proposed rules clearly state that labor is a 'necessary' cost and that increases in price to pay for labor costs are allowed. . . we were also pleased to see that the proposed regulations cap ride-hailing profits rather than costs, including labor costs."[97] IDG's sentiment was shared by other individual driver commentators, who stated certain ride-hailing companies had disconnected the amount of money charged during "surge" periods from the amount of money paid to drivers.[98]

The Attorney General agrees with the IDG. The rules do not foreclose or discourage increases in driver pay by HVGTs. To the extent ride-hailing companies justify surge prices by the need to pay drivers extra to alleviate demand, price gouging laws do not interfere. If on the other hand HGTVs raise prices beyond amounts paid to drivers and have no other additional costs recognized by the law, they are potentially profiting in violation of the law. [99]

OAG Staff Report Economic Background Section

OAG received a comment from Professor Michael Giberson principally concerning Part One of the Staff Report, which contained a literature survey of price gouging economics.[100] Prof. Giberson argued the Report engaged in "one-sided treatment" of certain studies of price gouging and inconsistently applied methodological principles vis-à-vis the treatment of empirical versus theoretical studies.

Professor Giberson also notes that much of the analysis to which he objects is essentially besides the point when it comes to the rules themselves, identifying only three "point[s] where economic analysis may bear on the regulatory design choices or the interpretation of a given provision."[101] Those points are addressed under each specific rule. Otherwise, the empirical evidence marshalled either in his comment or the studies it cites

("Don't"); Mosheur Rahman, Second NPRM Comments at 107 ("NYC taxi drivers work hard and we deserve better"); Robert Gomez, Second NPRM Comments at 108 ("Please stop hurting TLC RideShare drivers"); Zico Kashef, Second NPRM Comments at 111 ("I believe everything before is great. I don't accept the new rules.")

[97] IDG, Second NPRM Comments at 112.

[98] William Bombard, Second NPRM Comments at 109; Felix Garcia, Second NPRM Comments at 101-102.

[99] Felix Garcia, Second NPRM Comments at 101 ("I have seen many times how Uber raises rates drastically during storms, blackouts, or other events, but that does not always translate into a better profit for us drivers. In critical moments, it seems that digital platforms benefit from the crisis, while we [drivers] take more risks and earn the same or even less.").

[100] Michael Giberson, Second NPRM Comments at 1-16.

[101] *Id*. at 14.

involve the operation of price gouging *statute*s, not regulations, and have very little to say about how regulations might ameliorate the apparent defects of the statutes.

Finally, Professor Giberson makes a general recommendation for greater transparency in enforcement proceedings.[102] The Attorney General has issued a press release and published the full text of settlement agreements upon the conclusion of price gouging investigations; such settlement agreements invariably include detailed findings of fact. In the same way, all litigation on price gouging is filed publicly in state court and is readily available to researchers.

As for the remainder of the report, the Attorney General has struck the parts of the report to which Prof. Giberson objected as unnecessary to support the rules proposed.

Statutory Penalties

The Consumer Brands Association expressed "concerns over the extreme penalties involved with potential enforcement of these proposed rules."[103] A reduction of the maximum statutory penalty must be addressed to the Legislature.

[102] Michael Giberson, Second NPRM Comments at 12 n. 37.

[103] CBA, Second NPRM Comments at 41.

LAW-06-25-00008-P – Definitions and Unconscionably Excessive Prices (13 N.Y.C.R.R. §§ 600.1, 2, and 10)

Comments Addressed Elsewhere

The purpose of Rule 600.1 and 600.2 is, by and large, to set out shorthand definitions for otherwise verbose terms without necessarily defining them more precisely, such as compressing "abnormal disruption of the market" to "disruption" or "goods or services vital and necessary for the health, safety, and welfare of consumers or the general public" to "essential products" (600.1) and establish a roadmap linking the substantive parts of the regulation to the statute to avoid unnecessary cross-referencing (600.2).

Accordingly, proposals demanding changes to 600.1 and 600.2 are addressed in the Assessment of the rule to which they are best addressed:

- Greenberg Traurig, on behalf of "numerous" but unnamed "business clients," proposes alterations to Rule 600.1 and 600.2 to "account for typical market fluctuations."[104] This proposal is addressed in the Assessment to proposed rule 600.7 (presumptive cases of gross disparities in price).
- Greenberg Traurig proposes alterations to Rule 600.1 and 600.2 to further define "abnormal disruption of the market" or create exceptions to the statute based on certain characteristics of abnormal disruptions.[105] This comment is addressed in Comments Concerning Abnormal Disruptions of the Market, above.
- The National Federation for Independent Businesses assserts that the Rule 600.1(a) "defines 'abnormal disruption of the market'" in a manner that "is too vast and too vague."[106] Similar comments were made by other commentators.[107] Rule 600.1(a) is copied verbatim from G.B.L. § 396-r(2). The purpose of Rule 600.1(a) is to define the shorthand term "triggering event" and permit the regulation to be a one-stop-shop for businesses, rather than further define "abnormal market disruption." The substance of NFIB's comment is addressed in Comments Concerning Abnormal Disruptions of the Market, above.
- Various commentators raised concerns about the inclusion of sales tax and other government charges in overall price. Although addressed in part by a clarifying amendment to rule 600.1, the substance of these comments is treated in the Assessment of comments on the costs rule, 600.9, below.

[104] Greenberg Traurig, Second NPRM Comments at 17-19.

[105] *Id*. at 19-20.

[106] NFIB, Second NPRM Comments at 31.

[107] FIA, Second NPRM Comments at 34; NYSHTA, Second NPRM Comments at 67.

Geographic Scope of Statute

The Association for Affordable Medicines argues that certain parts of rule 600.1 would substantively alter the geographic scope of price gouging enforcement.[108] This was not intended; the sections called out by the Association either repeat statutory definitions in a "one stop shop" (as in the definition of "seller", which quoted the statutory text verbatim) or provide shorthand for commonly-used phrases.

In particular, the collapse of "sale" and "offer for sale" as a matter of definition is intended as a helpful shorthand, given that the statute uses "sale" and "offer for sale" together in every context in which they appear bar one. It is not intended to collapse that distinction when the distinction is relevant to the analysis.

Clarifying amendments have been made to remedy any confusion on the substance of either definition.

Goods and Services Covered by the Price Gouging Statute

Professor Giberson remarks that the statutory definition of "goods and services vital and necessary for the health, safety, and welfare of the public" is "elastic[] and knowledgeable observers disagree about [its] scope," pointing to New York City officials stating that the "price gouging rules" did not apply to webcams.[109] Professor Giberson calls for regulation to "tighten" the statutory definition of goods and services.

The confusion Professor Giberson identifies arises from the different definition of essential product (or its equivalent) in the New York City price gouging regulations. City regulations define essential products narrowly as those that are "essential to health, safety, or welfare, or are marketed or advertised as such,"[110] while state law defines essential products more broadly as including "consumer goods and services used, bought, or rendered primarily for personal, family, or household purposes."[111] It is unsurprising that webcams would fall into the State definition and not the City definition.[112]

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[108] AAM, Second NPRM Comments at 50-60.

[109] Michael Giberson, Second NPRM Comments at 14.

[110] Rules of N.Y.C., tit. 6 § 5-42.

[111] G.B.L. § 396-r(2)(d)(i).

[112] In common with most consumer protection statutes, G.B.L. § 396-r has no preemptive effect on local price gouging regulations. It is open to localities to adopt price gouging rules that appropriately fit local needs and circumstances.

“Usual Course of Business”

The Food Industry Alliance of New York State comments that the regulation should clarify its application when the price gouging statute is activated immediately following periods in which sellers have been coincidentally suppressing the price of essential products as part of a promotion (i.e. a “20% off sale”).[113] The Attorney General agrees that further clarification is needed, and has made non-substantial changes to the definition in this rule and accompanying RIS to address this concern.

[113] FIA, Second NPRM Comments at 35.

Comments Concerning the Definition of Abnormal Disruptions of the Market (new proposed rule 600.3)

Several commentators call for further rulemaking concerning the statutory definition of "abnormal disruption of the market." The statutory text reads:

> [2](b) For purposes of this section, the phrase "abnormal disruption of the market" shall mean any change in the market, whether actual or imminently threatened, resulting from stress of weather, convulsion of nature, failure or shortage of electric power or other source of energy, strike, civil disorder, war, military action, national or local emergency, drug shortage, or other cause of an abnormal disruption of the market which results in the declaration of a state of emergency by the governor.
>
> (c) For purposes of this section, the term "drug shortage" shall mean, with respect to any drug or medical product intended for human use, that such drug or medical product is publicly reported as being subject to a shortage by the U.S. Food and Drug Administration.

The Attorney General concludes that rulemaking is appropriate to define the phrase "stress of weather [or] convulsion of nature" in such a way that the statute will be activated only upon the issuance of certain determinate classes of government warnings. The Attorney General continues to adhere to the determination made in prior rulemakings that further explication of abnormal disruption triggers is not warranted at this time.

Limiting Enforcement to Gouging During Governor-Declared Emergencies

Several commentators argued the Attorney General should adopt a new rule that would essentially repeal all but the last clause of G.B.L. § 396-r(2)(b), and provide that an abnormal disruption of the market would be deemed to take place if and only if the Governor issued an emergency declaration.[114] Justifications for this proposal were similar; the Food Industry Alliance was representative, saying that only if the statute is triggered upon a "national, state, or local declaration of emergency . . . formally issued by the

[114] *See* Greenberg Traurig, Second NPRM Comments at 19-20; BCNYS, Second NPRM Comments at 23-25; NFIB, Second NPRM Comments at 31; FIA, Second NPRM Comments at 34; HDA, Second NPRM Comments at 63; NYSHTA, Second NPRM Comments at 67.

applicable government authority . . . [can] the regulated community be put on clear and consistent notice that a triggering event has occurred."[115]

As the Attorney General has noted elsewhere,

New York's price gouging statute does not, by design, require the issuance of an declaration of emergency by the governor to come into effect.[116] Thus, for example, the Appellate Division found that the prohibitions in the price gouging statute applicable to the COVID-19 pandemic came into effect not upon the issuance of the Governor's declaration of emergency on March 7, 2020, but two weeks prior: "[b]y the time of the [U.S. Centers for Disease Control's] February 26, 2020 warnings, which were preceded by various governmental warnings and advisories and significant novel coronavirus media coverage, there was a change in the market for the Lysol product resulting from a national public health emergency."[117]

Many abnormal market disruptions, above all those associated with human disasters (such as "failure or shortage of electrical power") are self-evident. No court has rejected OAG's submission that an abnormal market disruption existed; few defendants in proceedings brought under the statute have even contested the point.[118] The closest a defendant has come to disputing the details of a disruption occurred in *Quality King*, and there the defendant conceded the existence of the COVID-19 disruption and disagreed with OAG only as to the particulars of when, within a course of a few weeks, the disruption began with respect to disinfectant wipes.[119]

Likewise, OAG does not agree with the argument pressed by some commentators that failing to adopt a declaratory regime would have the effect of creating a *de facto* price cap on goods or services.[120] Businesses in New York are not acting like there is a *de facto* price cap even though the problems described by commentators are, to the extent they exist, inherent to the statutory text and have been in place in one way or another since 1979.

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[115] FIA, Second NPRM Comments at 34.

[116] G.B.L. § 396-r(2).

[117] *People v. Quality King Distributors, Inc*, 209 A.D.3d 62, 76 (1st Dep't 2022).

[118] *See Quality King*, 209 A.D.3d at 62 (COVID-19, disinfectant wipes); *People v. My Service Center Inc*., 14 Misc. 3d 1217 (Sup. Ct, Westchester County 2007) (Hurricane Katrina, gasoline); *People v. Wever Petroleum, Inc*., 14 Misc. 3d 491, 492 (Sup. Ct, Albany County 2006) (Hurricane Katrina, gasoline); *People v. Beach Boys Equip. Co., Inc*., 273 A.D.2d 850, 851 (4th Dep't 2000) (January 1998 ice storm, electric generators); *People v. Dame*, 289 A.D.2d 997 (4th Dep't 2001) (Labor Day Derechos of 1998, roof repairs); *People v. Chazy Hardware, Inc*., 176 Misc. 2d 960, 961 (Sup. Ct, Clinton County 1998) (January 1998 ice storm, electric generators); *People v. Two Wheel Corp*., 71 N.Y.2d 693, 696 (1988) (Hurricane Gloria, electric generators).

[119] 209 A.D.3d at 77.

[120] *See, e.g.*, BCNYS, Second NPRM Comments at 26.

That said, the Attorney General agrees with commentators that the statutory scheme would be enhanced by regulatory elaboration of the phrases "stress of weather" and "convulsion of nature," which have fallen out of common parlance.[121] OAG has issued a notice of proposed rulemaking, alongside this Assessment, on that subject.[122]

Limiting Enforcement Based on the Content of Gubernatorial Emergency Declarations

Some commentators further proposed that the statute be set to apply only where the Governor's declaration of emergency met certain criteria in order to provide greater certainty to businesses. Greenberg Traurig, for example, suggested that a disruption be regulatorily deemed not to exist unless the Governor's declaration "specif[ies] the triggering event, affirmatively state[s] that an abnormal market disruption has occurred, and specifies] both the geographic scope and duration of the state of emergency declaration based on the available information about the triggering event at the time of the declaration."[123]

The Attorney General rejected these proposals for the reasons described above applicable to limiting the statute to Gubernatorial emergencies. Any regulation keyed to specific gubernatorial recitals would practically bar the Attorney General from enforcing the price gouging statute unless authorized by the Governor. The Legislature is precise about those situations where the Attorney General may act only upon Gubernatorial reference,[124] and such preconditions are conspicuously absent from this statute.

Finally, with respect to proposals that the Governor specify the products or geographic locations affected by an abnormal market disruption,[125] such rulemaking is unnecessary. The statute places the burden on the Attorney General to prove that a triggering event resulted in an abnormal disruption of the market for the specific goods or services at issue in an enforcement proceeeding. The same pieces of evidence OAG would use to carry this burden—National Weather Service reports, other statements from relevant government agencies, news articles, and so on—are available to any market participant. Indeed, oftentimes sellers are the first to identify disruptions in their market. For example,

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[121] *See, e.g.*, Curb Mobility, Second NPRM Comments at 131 (calling for "clear, objective criteria").

[122] The Attorney General believes this guidance satisfactorily addresses the concerns regarding "convulsion of nature" articulated by NYSHTA, Second NPRM Comments at 67.

[123] Greenberg Traurig, Second NPRM Comments at 20. *Accord* BCNYS, Second NPRM Comments at 24-25; NFIB, Second NPRM Comments at 31; FIA, Second NPRM Comments at 35; HDA, Second NPRM Comments at 63.

[124] *See, e.g.*, Executive Law § 63(8) ("Whenever in his judgment the public interest requires it, the attorney-general may, *with the approval of the governor*, and when directed by the governor, shall, inquire into matters concerning the public peace, public safety and public justice." [emphasis added]); *cf. People v. Cuttita*, 7 N.Y.3d 500, 507-09 (2006).

[125] *See, e.g.*, BCNYS, Second NPRM Comments at 25.

during the outbreak of the 2022 Ukraine War, large oil and gas companies were frank in identifying the existence of an abnormal disruption in the market for gasoline and diesel products.[126] For another example, a hotelier might not be in the path of a hurricane but will readily perceive that the hurricane-adjacent hotel market is disrupted when refugees from that hurricane arrive at its door.[127] The precise geographic scope will vary with each disruption, and is best left to case-by-case determination.

Pre-Disruption Price Advertisements

Greenberg Traurig comments that the regulations "should also allow a seller to rebut the presumption [of price gouging] where the seller's prices were advertised, e.g., posted on its website, prior to the abnormal economic disruption and continued to be offered by the seller throughout the disruption."[128] It proposed adding an exclusion from liability for prices "where the fluctuation in price was consistent with the seller's advertised prices that were displayed prior to the triggering event and not attributable to the abnormal economic disruption."

Greenberg Traurig does not offer a specific justification for this proposal and it is unclear what problem this language is intended to address. The Attorney General agrees that if a seller offers a product for sale in the usual course of business at a given price before the disruption, and then continues to offer that product at that price after the disruption, there is—by definition—no "gross disparity in price." Conversely, if a seller advertised on a clear day that it would raise prices for all goods by a large amount on a date that coincided with the disruption, the statute's purposes are advanced by requiring the seller to hold off on the increase unless the increase can be justified by additional costs.

But further regulation is not necessary to spell this point out; it is clear from the statute itself, and the existing regulations, that this is the case. Indeed, rule 600.6(b)(1) states that if the seller's usual course of business is to offer the product at a single price irrespective of the buyer (e.g. a supermarket), the price at which the seller "last offered" the essential product is the benchmark price.

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[126] *See generally* Ron Bousso, *Shell to exit Russia after Ukraine invasion, joining BP* (Mar 1, 2022), https://www.reuters.com/business/energy/shell-exit-russia-operations-after-ukraine-invasion-2022-02-28/

[127] *See, e.g.*, OAG, *A.G. Schneiderman Announces $40k Settlement with Brooklyn Hotel for Price Gouging in the Wake of Hurricane Sandy* (Oct. 24, 2013), https://ag.ny.gov/press-release/2013/ag-schneiderman-announces-40k-settlement-brooklyn-hotel-price-gouging-wake

[128] Greenberg Traurig Comment, Second NPRM Comments at 21.

Applicability of Price Gouging Statute to Tariffs

The Food Industry Alliance of New York State asks the Attorney General to "consider[]" whether the imposition of a tariff is an abnormal market disruption.[129] The rules submitted for comment did not touch on this question. The Attorney General does not believe a rulemaking on the definition of "abnormal market disruption" is warranted at this time beyond its initial proposal to define "stress of weather [or] convulsion of nature," leaving the definition of other terms in that subdivision of the statute to case-by-case development or future rulemaking.

To the extent that the FIA requests clarification that tariffs are statutory costs, the Attorney General has accepted that proposal and has made clarificatory changes to rule 600.9 to clarify that all taxation, which includes tariffs, are statutory costs.

[129] FIA, Second NPRM Comments at 35.

LAW-06-25-00007-P –Unfair Leverage Examples (13 N.Y.C.R.R. § 600.4)

Connection Between Rules 600.4(e) and 600.5

The Food Industry Alliance of New York and American Petroleum Institute, in comments dwelling predominantly on rule 600.5 (unfair leverage of market position) incorporated into their critique of that rule a critique of rule 600.4(e).[130] This subdivision of the rule is purely a cross-reference. If Rule 600.5 were to be repealed, or invalidated, OAG would amend this rule to delete 600.4(e). All comments concerning the substance of rule 600.4(e), are treated in the assessment of comments to rule 600.5.

Lawfulness of Rule

The American Petroleum Institute comments that this rule "strips" from a court the power to determine whether there was an exercise of unfair leverage or unconscionable means and instead "create a presumption of unfair leverage if there is any price increase (no matter how small) from a seller that holds certain market shares."[131]

To the extent the API comments that this rule is unlawful owing to the "question of law for the court" language in G.B.L. § 396-r(3), that objection is addressed in the Assessment of Comments Applicable to Multiple Rules, above. Otherwise, the Attorney General disagrees with the comment. The rule text does not foreclose a court's determination that other conduct not specified in the regulation is an exercise of unfair leverage or unconscionable means.

As for the examples themselves, it is a common and helpful function of regulation to collect and consolidate existing caselaw or statutory provisions to facilitate compliance and provide guidance for regulated parties.[132] Each of the examples collected in this rule is based on binding precedent, set out at length in the Regulatory Impact Statement, from courts holding the practices unconscionable. Indeed, no commentator raises any objection to any of these examples or disputes that the examples are, in fact, exemplifications of the exercise of unfair leverage or unconscionable means.

[130] FIA, Second NPRM Comments at 33; API, Second NPRM Comments at 82-83.

[131] API, Second NPRM Comments at 82-83.

[132] *See, e.g.*, 12 C.F.R. § 1006.22(b)-(f).

LAW-06-25-00006-P – Unfair Leverage of Market Position (13 N.Y.C.R.R. § 600.5)

Difficulties in Market Definition

The proposed rule provides that unfair leverage is presumed when a seller increases the price of an essential product where they have either a particularly large market share (>30%) or a large share in a consolidated market. The Business Council of New York, National Federation of Independent Businesses, the Food Industry Alliance of New York State, the New York Association of Convenience Stores, and the Consumer Brands Association, among others, expressed concern that the use of a market share paradigm would require businesses to engage in market definition, which they asserted would be an unduly complex and difficult exercise.[133]

The Attorney General does not agree with these comments. Businesses of sufficient size must routinely engage in market definition already: antitrust scrutiny, whether from consumers, government enforcers, or direct competitors, is a fact of American business life, and the antitrust laws require definition of the relevant market.[134] By using the same standards as applicable antitrust law, the regulation imposes no burden on a business that would not have been imposed by another law already.[135] The decision to link the regulation's definition of "market share" to the legal doctrines defining that term in antitrust provides a "rigorous [and] quantifiable" definition of "market share."[136]

Insofar as businesses may react to this rule by not raising prices except where they can demonstrate cost-justification, such an action is consistent with the intent and purpose of the statute, as well as the public interest.

Costs of Compliance with Regulations

The Food Industry Alliance of New York State comments that this regulation will be costly to comply with because "if affected retailers [i.e. those with >30% market share or >10% market share in concentrated markets] have any increase in price it will be a

[133] *See, e.g.*, BCNYS, Second NPRM Comments at 26-27; NFIB, Second NPRM Comments at 32; FIA, Second NPRM Comments at 33-34; NYACS, Second NPRM Comments at 37; CBA, Second NPRM Comments at 41-42.

[134] *See, e.g.*, *City of New York v. Grp. Health Inc.*, 649 F.3d 151, 155 (2d Cir. 2011) ("To state a claim under § 7 of the Clayton Act, §§ 1 or 2 of the Sherman Act, or New York's Donnelly Act, a plaintiff must allege a plausible relevant market in which competition will be impaired.")

[135] To the extent that commentators assert that market definition requires econometric analysis, that assertion is unfounded. *See* Daniel Hanley, *Redefining the Relevant Market: Abandonment or Return to Brown Shoe* 129 DICKINSON L. REV. 571 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4404081

[136] NYACS, Second NPRM Comments at 37.

presumed violation, therefore both [OAG] and the retailer will be required to spend resources on an investigation . . . whereas unaffected retailers with similar price increases would not be subject to presumptive violations and thus have no investigation or defense costs."[137] FIA predicts
"a preponderance [sic] of . . . continuous, meritless claims of price gouging [that] will force the entire retail food industry to spend excessively to refute the claims."[138] In a similar vein, the Healthcare Distributors Alliance opined that the regulation would "create an expensive burden on the State to enforce such a nominal price increase standard on thousands of manufacturers and hundreds of thousands of products."

The Attorney General does not agree with these comments. At outset, the statute is not privately enforceable.[139] It also does not follow that an entire industry is burdened by a rule applicable, by its terms, only to the largest businesses. Nor is it correct that OAG would be "required to spend resources on an investigation" in response to each and every instance of potential price gouging. Even "statutes that, by their terms, seem to preclude nonenforcement . . . cannot be interpreted literally."[140]

Nor, for that matter, does "the plaintiff" (presumably OAG, as the statute lacks a private right of action) "have the burden of proof to come forward with evidence of these allegations during discovery."[141] "[A] price-gouging action by the AG is a special proceeding, the procedure for which is outlined in CPLR article 4."[142] As a practical matter, OAG does not engage in conventional discovery in an article 4 special proceeding; it must "come forward with evidence" sufficient to establish summary judgment *at the moment of filing*, and so determines the existence of that evidence via subpoena rather than discovery.

Because AG subpoenas require for their enforcement only that the "documents sought bear a reasonable relation to the issue of whether respondent or others in the chain of distribution of respondent's products engaged in price gouging,"[143] and can be quashed only on a showing that "the futility of the process to uncover anything legitimate is inevitable

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[137] FIA, Second NPRM Comments at 33-34.

[138] *Ibid*.

[139] *Americana Petroleum Corp. v. Northville Indus. Corp*., 200 A.D.2d 646, 648 (2d Dep't 1994) (G.B.L. § 396-r "expressly provides that only the Attorney General may bring actions on behalf of consumers . . . . we decline to expand the statute's reach to include a private right of action for wholesale and retail merchants of gasoline, because such an expansion would not be consistent with the legislative scheme and would not promote the legislative purpose.").

[140] *Town of Castle Rock, Colorado v. Gonzalez*, 545 U.S. 748 (2005) (quoting 1 ABA Standards for Criminal Justice 1-4.5, commentary, pp. 1-124 to 1-125 (2d ed. 1980)); *accord Alliance to End Chickens as Kaporos v. New York City Police Dept.*, 32 N.Y.3d 1091 (2018).

[141] FIA, Second NPRM Comments at 33.

[142] *People by James v. Quality King Distributors, Inc*., 209 A.D.3d 62, 74 (1st Dep't 2022).

[143] *Matter of People v. Tyson Foods*, 218 A.D.3d 424 (1st Dep't 2023).

or obvious,"[144] it follows that the regulation does not *increase* potential investigatory burdens on targets, it was always possible for the AG to seek documents concerning price gouging, and that power as well as the burden of such document demands remains the same before and after the regulation is finalized.[145]

This point was confirmed in *People v. Tyson Foods*, where OAG sought via subpoena documents concerning out-of-state sales of meat during the COVID-19 pandemic and the defendant sought to quash the subpoena on relevance grounds.[146] Where the trial court held that the documents sought were relevant because out-of-state sales were captured by the statute, the First Department affirmed on the broader ground that *whether or not* the sales were captured by the statute, they were the proper subjects of a subpoena because they were not totally irrelevant to price gouging. In the same way, even if FIA is correct that the statute is not implicated by price increases of less than 10% engaged in by possessors of significant market leverage, documents about the sales were, are, and will continue to be susceptible to subpoena as part of any proper OAG price gouging investigation. The regulation has no impact on the investigatory burden, and thus cost burden, imposed on defendants.

Granting for the moment FIA's claim that "establishing a 'relevant market' and 'market power' requires extensive expert analysis," the regulation places on *OAG* the burden of proving the market, market share, and, if OAG pursues a claim based on HHI, the relative HHI of the market. These proofs must be developed, ideally to the point where they are beyond material factual dispute, but certainly to the point where they show a genuine dispute of fact, *before filing a proceeding*. So if there is any great burden in proving market definition, that burden falls first and foremost on OAG, not defendants.

Insofar as FIA requests unspecified "extensive[]" modifications of the rule "as it relates to current anti-trust regulations,"[147] the final rule draws on existing antitrust concepts so as to allow OAG and regulated entities to avail themselves of the precedent that accompanies these concepts.

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[144] *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 331-332 (1988).

[145] As for FIA's specific concern about the burden of expert analysis, OAG subpoenas by their nature do not compel their targets to create wholly new documents or analyses rather than produce documents in existence. Expert analysis would be required only at the instantiation of a proceeding, that is, after the "fact discovery" phase of the investigation via subpoena.

[146] *Matter of People v. Tyson Foods*, Index No. 156457/2022, NYSCEF Doc. No. 45 (Sup Ct, N.Y. County Dec. 7, 2022); *aff'd* 218 A.D.3d 424 (1st Dep't 2023).

[147] FIA, Second NPRM Comments at 34.

Small or Rural Business Exclusion from Scope of Regulation

The National Federation of Independent Businesses, reflecting on concerns that small businesses would be unable to define their market share, commented that small business should be exempt wholesale from the application of this rule.[148] The NFIB did not provide a definition of "small business." Definitions of small business vary, but the most common definition in New York is from section 131 of the Economic Development Law, which defines a small business as "one which is resident in this state, independently owned and operated, not dominant in its field and employs one hundred or less persons."[149]

The Attorney General agrees with the NFIB that small business should be expressly excluded from the rule. Because the rule applies by its terms to entities that are at least arguably dominant in their field, excluding "small business" helpfully clarifies the application of the rule in a way that does not alter its scope substantially. The Attorney General is constrained to reject, however, the request of the New York Association of Convenience Stores ("ACS") for a "clear exemption [from the rule] for situations where limited competition arises from regional isolation or other outside factors."[150] Having clarified that small businesses are exempt from the rule, ACS supplies no other reason to exclude large or dominant businesses from the rule purely because they are isolated. Indeed, it is in situations where, for example, a gas station is the only available gas station for local residents, that price gouging concerns are at their apex because the lack of competitive forces put the entire community at the mercy of a seller.

Under subdivision (d)(2), it is open to sellers in the situation identified by the ACS to argue that regional isolation or other factors represent circumstances in the relevant market that indicate it was not highly concentrated or that the seller lacked market power.

Use of 30% Market Share as Presumption of Unfair Leverage

The Consumer Brands Association and American Petroleum Institute criticize the proposed regulation's provision that control of a 30% market share renders non-cost-justified price increases during disruptions a presumptive example of unfair leverage.[151] Noting that the Regulatory Impact Statement pointed to the U.S. Supreme Court's opinion in

[148] NFIB, Second NPRM Comments at 32.

[149] *See, e.g.*, *Morgan v. Ponder*, 892 F.2d 1355, 1357 (8th Cir. 1989) (small-town paper that was exclusive paper for the locality found liable at trial for Sherman Act § 2 violations, although notably the 8th Circuit reversed for want of evidence of predatory behavior).

[150] NYCAS, Second NPRM Comments at 37.

[151] CBA, Second NPRM Comments at 42-43; API, Second NPRM Comments at 82-83.

United States v. Philadelphia National Bank ("*PNB*") as the source of the 30% presumption,[152] they argue that reliance on *PNB* was misplaced.

First, commentators argue that because *PNB* interpreted section 7 of the Clayton Act concerning mergers and was thus focused on detecting "concentration in its incipiency," it is not relevant to the question of "assessing actual conduct" in a concentrated market. Instead, commentators pointed to cases discussing the existence of market power that set the threshold for inferring such power at 50% or more of the relevant market.[153]

The Attorney General does not agree with these comments. The *PNB* presumption has been reaffirmed by federal courts sitting in New York as recently as January 2024.[154] And the most recent version of the Horizontal Merger Guidelines declares that "a merger that creates a firm with a share over thirty percent is also presumed to substantially lessen competition" when combined with an increase in market concentration.[155]

Meanwhile, as for the empirical basis of the presumption, as described in section 3 of the Regulatory Impact Statement, empirical analysis of mergers that triggered either the HHI or 30% presumption found that the vast majority did indeed decrease competition almost all of the time. The Attorney General reviewed the studies cited to by commentators that were claimed to support their economic arguments and undermine the analysis set forth in the studies employed in the Regulatory Impact Statement.[156] These rebuttal studies

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[152] 374 U.S. 321, 364 (1963) ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat").

[153] *See, e.g.*, CBA, Second NPRM Comments at 42, *citing to Tops Markets, Inc. v. Quality Markets, Inc*., 142 F.3d 90, 99 (2d Cir. 1998) ("we have held that a market share of over 70 percent is usually 'strong evidence' of monopoly power, . . . market share below 50% is rarely evidence of monopoly power"); *Rebel Oil Co. v. Atl. Richfield Co*., 51 F.3d 1421, 1438 (9th Cir. 1995) ("numerous cases hold that a market share of less than 50 percent is presumptively insufficient to establish market power").

[154] *See Fed. Trade Commn. v. IQVIA Holdings Inc.*, No. 23-cv-06188 (ER), 2024 WL 81232, at *33 (S.D.N.Y. Jan. 8, 2024) (declaring "the Court is hard-pressed to conclude that the *Philadelphia National Bank* presumption has been repudiated. Second Circuit precedent appears to directly contradict that conclusion" and collecting cases).

[155] U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

[156] These studies include Douglas H. Ginsburg & Joshua D. Wright, *Philadelphia National Bank: Bad Economics, Bad Law, Good Riddance*, 80 GEO. MASON. L. & ECON. REV. 201 (2015); Michael Vita & F. David Osinski, *John Kwoka's Merger Control, and Remedies: A Critical Review*, 82 ANTITRUST L.J. 361, 363 (2018); Abbot Lipsky *et al*, *Purpose, Harms and Scope in Merger Review: Global Antitrust Institute Comment on the DOJ-F.T.C. Request for Information on Merger Enforcement* (Apr 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4089800; Joshua D. Wright & Jennifer Cascone Fauver, *Antitrust Reform and the Nirvana Fallacy: The Case Against a New Sherman Act*, 2022 COLUMB. BUS. L. REV. 72, 80-92 (2022)); Sharat Ganapati, *Growing Oligopolies, Price, Output, and Productivity*, 13 AM. ECON. J. MICROECONOMICS 309 (2021); and JULIUS GRODINSKI, THE IOWA POOL: A STUDY IN RAILROAD COMPETITION, 1870-84, 25, 27-28 (1950).

have, perhaps inevitably, inspired their own critiques in turn.[157] Meanwhile the conclusions of the studies referenced by the final rule's Regulatory Impact Statement have been supported by still other recent analyses.[158] Taking these studies together with recent re-endorsement of structural presumptions by both the courts and the relevant federal agencies, the Attorney General is not persuaded that the structural presumptions employed in the rule lack a factual foundation.

The Attorney General further considers that the Clayton Act sets out the appropriate standards when considering presumptions of unfair leverage. It is true that the Clayton Act seeks to determine not whether a firm will have the power to increase prices (i.e. "market power") but when a proposed merger has a reasonable probability of a substantial impairment of competition; it was "the express intent of Congress to nip anticompetitive practices in the bud before they blossom into a Sherman Act restraint of trade."[159] The same principles apply in the price gouging context. "Us[ing] the leverage provided by the market disruption to extract a higher price . . . is what defines price gouging."[160] A party that does not possess monopoly power but has so much market share that it meets the structural Clayton Act presumptions is at undue risk of *acquiring* such power when an abnormal disruption hits.

Suppose there were three supermarkets in town, each with 33% market share. If a blizzard caused two or perhaps even one of the supermarkets to shut down, the remaining supermarket would immediately possess "the power to charge a price higher than the competitive price without inducing so rapid and great an expansion of output from competing firms as to make the supra-competitive price untenable,"[161] because their competitors were literally buried under the snow. That is textbook unfair leverage.

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[157] *See* Peter C. Carstensen, *The Philadelphia National Bank Presumption: Merger Analysis in an Unpredictable World,* 80 ANTITRUST L.J. 219, 241 (2015) (urging retention of the presumption); *see generally* J. Robert Robertson, *Editor's Note: Philadelphia National Bank at 50*, 80 ANTITRUST L.J. 189 (2015) (surveying literature).

[158] *See, e.g.*, Jaime S. King et. al., *Antitrust's Healthcare Conundrum: Cross-Market Mergers and the Rise of System Power*, 74 HASTINGS L.J. 1057 (2023) (finding that even across geographic markets, healthcare mergers raised prices); Matias Covarrubias *et al*, *From Good to Bad Concentration? US Industries over the Past 30 Years*, 32 NBER MACROECONOMICS ANNUAL (2019), https://www.journals.uchicago.edu/doi/full/10.1086/707169 (critiquing Ganapati's analysis in a 2018 study that in turn was the basis of his 2022 paper); Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. ECON. PERSPECTIVES 69 (2019), https://pubs.aeaweb.org/doi/pdf/10.1257/jep.33.3.69 (arguing that improved efficiencies from mergers decreases consumer welfare); Written Comments from the American Economic Liberties Project Request for Comments on Draft Merger Guidelines (Sept 18, 2023), https://www.economicliberties.us/wp-content/uploads/2023/09/2023-09-18-AELP-Merger-Comment.pdf (defending structural presumptions).

[159] *Fruehauf Corp. v. Fed Trade Comm'n.*, 603 F2.d 345, 351 (2d Cir 1979).

[160] *People v. Two Wheel Corp.*, 71 N.Y.2d 693, 698 (1988).

[161] *Am. Academic Suppliers, Inc. v. Beckley-Cardy, Inc.*, 922 F.2d 1317, 1319 (7th Cir. 1991) (Posner, J.)

In doctrinal terms, a Clayton Act incipient monopolist is much more likely to become a Sherman Act monopolist during a disruption as the circumstances of the disruption inhibit entry and potentially force exit. Such Clayton Act pricing power holders are also much more likely to take advantage of a structure problem implicit in the use of a 10% percentage presumption: the more concentrated the market, the easier it is for market participants to raise prices by 9.9% immediately upon the onset of a disruption to the net detriment of consumers.[162] This is why the rule employs Clayton Act thresholds and not monopoly power thresholds.

Finally, in response to comments concerning "who decides what a 30 percent market share is and . . . where is the market located," decades of relevant precedents supply applications of this principle for many if not most factual situations.

Use of 1,800 HHI Threshold for Unfair Leverage Presumption

In the draft proposed rule, the Attorney General proposed that the holder of a 10% or greater market share in a market with an HHI of 1,800 or more be presumed to exercise unfair leverage when increasing prices during an abnormal market disruption. The Business Council of New York and American Petroleum Institute argue that this does not satisfy conventional economic definitions of a concentrated market.[163]

The Attorney General disagrees with these comments. The 1,800 HHI level was chosen because that level was selected by the Federal Trade Commission and U.S. Department of Justice in the authoritative Horizontal Merger Guidelines: "Markets with an HHI greater than 1,800 are highly concentrated."[164] As the Agencies noted, this threshold has been repeatedly approved in appellate decisions.[165] It is not arbitrary to select the thresholds used in the most authoritative federal guidance available, preserved across Administrations of both parties.

To the extent that certain permutations of a greater than 1,800 HHI market might be considered competitive despite their relative concentration, the rule permits a defendant to show that "specific circumstances in the relevant market demonstrate [that] the relevant market was not highly concentrated and the seller lacked market power in the relevant market." Thus, in the Business Council's example of a hypothetical market with an 8%, 11%, 20%, 20%, 20%, and 21% market share holder (HHI of 1826), it would be possible—and, in

[162] *See* Comment of American Economic Liberties Project, ANPRM Comments at 2-7.

[163] *See* BCNYS, Second NPRM Comments at 26-27; API, Second NPRM Comments at 83-84.

[164] U.S. Dep't of Justice & Fed. Trade Com'n, *Merger Guidelines* (Dec. 18, 2023) https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf

[165] See, e.g., *Chicago Bridge & Iron Co. N.V. v. F.T.C.*, 534 F.3d 410, 431 (5th Cir. 2008); *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001); *F.T.C. v. Univ. Health, Inc.*, 938 F.2d 1206, 1211 (11th Cir. 1991).

the view of the Business Council, straightforward—for any of the competitors to make these showings.[166]

Economic Impact of Rules

The Consumer Brand Association comments that businesses will feel forced to sell goods at a loss because they cannot determine with sufficient confidence whether they meet the market share threshold. This, in their view, risks incentivizing businesses to either cease trading in the jurisdiction during crises or charge higher prices in non-disruption periods.

The Attorney General does not agree with this comment. A business knows that it must raise a price to a given level or take a loss. If a business *knows* that it is going to take a loss but for a price increase, then the cost defense provided by the rule would permit the business to raise prices by the amount needed to avoid the loss.

Consistency with Statutory Text

The American Petroleum Institute and Greenberg Traurig opined that the proposed regulation was *ultra vires* because the market share thresholds for unfair leverage and other concepts used by the rule are not sufficiently related to the statutory text.[167]

The Attorney General does not agree with these comments for substantially the reasons set out in the Comments Applicable to Multiple Rules section above. The purpose of these regulations is to effectuate and enforce the statute's prohibition on the use of "unfair leverage" in price setting by identifying two specific instances where unfair leverage is applied: when a firm employs its dominant market position to raise prices during a market disruption, or where the market is sufficiently concentrated that there is an unacceptable risk of functionally collusive price increases.

The statute aims to restrain the use of unfair leverage to raise prices. The proposed rule makes the reasoned determination that actors with large market share, or in concentrated markets, act with unfair leverage when they raise prices. It is both necessary and appropriate to use concepts from other legal doctrines concerning this form of unfair

[166] *See* BCNY Comment, Second NPRM Comments at 26-27 (describing this market: "By no means is that what any legitimate economist, or consumer, would consider a concentrated market").

[167] *See, e.g.*, Greenberg Traurig Comment, Second NPRM Comments at 21-22; API, Second NPRM Comments at 82-83.

leverage to define more precisely how this kind of unfair leverage is exercised.[168] As discussed above, the thresholds selected were chosen precisely because they were the clearest thresholds available to draw the unfair leverage line.

The Attorney General agrees with commentators that "price gouging is price gouging, whether committed by a larger corporate entity or a mom-and-pop shop,"[169] but the regulation reflects the reality that the mom-and-pop shop has far less power to price gouge than an entity with a particularly large market share, especially in a concentrated market. The statute aims to "excises the use of such advantage from the repertoire of legitimate business practices" during abnormal disruptions,[170] and the employment of market position to raise prices during a disruption is a form of unfair leverage.

The Attorney General does not agree with the commentators that because G.B.L. § 396-r(3)(a) draws from common-law unconscionability doctrine, concepts drawn from other doctrines are beyond its scope. When the Legislature added G.B.L. § 396-r(3)(a) to the statute in 1997, it deliberately ranged beyond unconscionability doctrine to incorporate an expanded concept—unfair leverage—into the statutory framework. As the Regulatory Impact Statement explains in detail, holders of large market shares or participants in concentrated markets apply unfair leverage in the wake of a disruption to extract a higher price: the disruption itself may change the competitive dynamics of the market to the net detriment of consumers.

And the common-law doctrines of restraint of trade and of unconscionability share goals. "Congress designed the Sherman Act as a consumer welfare prescription. A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law."[171] Price gouging likewise involves actions that reduce the importance of consumer preference in setting price and output through parties in the chain of distribution "taking unfair advantage of the public by charging grossly excessive prices for essential goods and services."[172] If a contract is unconscionable because the counterparty is forced to enter it, and cartels are unlawful because they force consumers to pay higher prices than a competitive market would permit, at heart they are objectionable for the same reason: because they involve the application of economic coercion to create excess profits at the expense of the public.

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[168] API rests its legal argument on this point on the First Department's decision in *Stevens v. New York State Division of Criminal Justice Services*, 206 A.D.3d 88 (1st Dep't 2022). That decision was reversed by the Court of Appeals two years before API's letter, 40 N.Y.3d 505, a point API nowhere acknowledges.

[169] Greenberg Traurig Comment, Second NPRM Comments at 22.

[170] *People v. Two Wheel Corp.*, 71 N.Y.2d 693, 699 (1988).

[171] *Natl. Coll. Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 107 (1984) (cleaned up); *see also X.L.O. Concrete Corp. v. Rivergate Corp.*, 83 N.Y.2d 513, 519 (1994) (describing interaction between unlawful contract prices and competition).

[172] G.B.L. § 396-r(1).

Specific Impact on Pharmaceutical Distributors

The Healthcare Distributors Alliance comments that the "unique model" of wholesale pharmaceutical distributors render the presumptions in the rules inappropriate as to their industry.[173] This comment provides no basis to reject the rules' thresholds.

The central premise of HDA's claim that their market is "unique" is that wholesalers do not themselves set the prices they charge for wholesale pharmaceuticals. If this claim is correct, however, it follows that wholesalers will always be able to rebut any claim of price gouging because the costs incurred for manufacturer purchases will always match wholesale prices.

HDA recognizes this feature of the statute, but its only response is that "being required to provide such evidence simply based on market share would create costly and burdensome disruptions for both the industry and the state."[174] The requirement to provide evidence to substantiate claimed cost increases does not flow from the regulation but from the Attorney General's subpoena powers under the statute.

Moreover, HDA's discussion of the features of the highly concentrated market in which its members operate strengthen the case for applying the rule to its industry. Downstream pharmacies appear compelled to pass on any upward deviation from wholesaler price if a distributor were to elect to increase profits during a disruption by deviating upwards from the wholesaler price thanks in part to the highly concentrated nature of the distributor market. If wholesalers do *not* deviate upwards from wholesaler price increases then, as noted above, they will not likely be exposed to price gouging liability.

The Attorney General considered HDA's proposal to include an exemption from this rule for "entities that do not set the list price of the products they sell." But this proposal is nothing more than an industry carve-out, because the word "*list*" means a wholesaler could attach a 100% price increase to a given generic drug and claim exemption from the price gouging laws because the *list* price, rather than its exemplary fee, was not set by it. If *the price* of the drug being sold was entirely outside the wholesaler's control and it charged only that price, it would be open to the wholesaler to argue that it is not in fact "selling" or "offering" that drug at all, because it is facilitating the sale or offering for sale of a third party

[173] HDA, Second NPRM Comment at 63-64. This submission is accompanied by laudatory comments regarding the HDA from a Deloitte report HDA appears to have commissioned. *See* Terry Hisey & Rob Jacoby, *et al*., *The role of distributors in the US health care industry*, DELOITTE (2019), https://www.hda.org/getmedia/88288d13-f0b2-430d-9771-b71db1497f35/HDA-Role-of-Distributors-in-the-US-Health-Care-Industry.pdf. These comments do not appear to be relevant to any rule and do not require a response.

[174] HDA, Second NPRM Comments at 64.

(the manufacturer). HDA's comment is otherwise addressed in the reasons set out in Comments Applicable to Multiple Rules regarding industry carve-outs, above.

Application of Cost and Market Share Defenses

Lyft proposes that the rule clarify "an appropriate manner for sellers of dynamically priced goods and services" to apply the cost- and profit-based defenses articulated in the proposed rule.[175] The rule has been clarified to underscore that the cost or profit defense tracks the elaboration of these defenses in proposed rule 600.9. The rule's third proposed defense respecting "specific circumstances in the relevant market" also permits Lyft or others to make the submissions it describes in its comment in any enforcement invoking the rule. Whether or not these specific circumstances are sufficient to defeat an unfair leverage showing will, of course, depend on the facts and circumstances in each case.

[175] Lyft, Second NPRM Comments at 127 (suggesting the rule clarify "that defenses other than the specific methods included in the Proposed Rule are available to rebut the Proposed Rule's presumptions").

LAW-06-25-00005-P – Dynamic Pricing/Benchmark Price Determination (13 N.Y.C.R.R. § 600.6)

This proposed rule has been withdrawn and thus no assessment of comments received is required. The Attorney General intends to issue a notice of proposed rulemaking on this topic shortly. Given the relationship between comments on this rule and other rules, however, responses to certain comments are set out below.

Lyft argues that the proposed rule on pre-disruption benchmark price identification should clarify what evidence rebuts a prima facie case. Provisions on rebuttal of the prima facie case are set out in the roadmap in rule 600.2; the substance of these provisions is contained at rule 600.9. This prevents inadvertent inconsistencies that might arise if the same cost-based defense were described differently in different parts of the rules.

Similarly, the New York State Hospitality and Tourism Association proposed a series of changes to the pre-disruption benchmark price identification rules that would add cost-based or circumstances-based non-affirmative defenses to price gouging.[176] The substance of NYSHTA's comments is treated in rule 600.7 and 600.9.

[176] NYSHTA, Second NPRM Comments at 65-67.

LAW-06-25-00010-P – Presumptive Cases of Gross Disparity (13 N.Y.C.R.R. § 600.7)

Seasonal, Regional, or Global Market Fluctuations

Greenberg Traurig, the Business Council of New York, the National Federation of Independent Businesses, and the New York State Hospitality and Tourism Association expressed the concern that a 10% presumptive threshold (or, indeed, even a far higher threshold) might risk penalizing businesses that have a regular practice of lawfully increasing their prices on a seasonal basis.[177] For example, commentators assert that tourist areas see price fluctuations in the run-up to peak tourist seasons; if a disruption coincided with the shift from low to high season those "natural" price increases would become unlawful even though prices would have happened either way.[178]

A similar strand of comments sought to distinguish between price increases that represented price gouging and price increases that "responded" to "market conditions like supply and demand and factors that impact production," "market fluctuations," or "high-demand events."[179] Commentators pointed to other States whose statutes included "safe harbors" for either seasonal pricing fluctuations,[180] or "fluctuations in applicable regional, national, or international market trends,"[181] and suggested that the regulations be amended to include such safe harbors.

The Attorney General finds a seasonal disruption safe harbor is not consistent with the statutory text and purposes.

The price gouging law rests on the premise that an action that is lawful under ordinary circumstances—increasing prices from pre-disruption benchmark by a gross disparity without a cost or profit justification—can become unlawful during disruptions. The unfairness of price gouging arises from the unjustified and grossly disparate price increase taking place "during" disruption caused by a triggering event; even if the additional leverage provided by the disruption would not have been a necessary condition for a price increase under ordinary circumstances, the statute considers that leverage to presumptively have been employed (even if inadvertently) when unjustified price increases are made during

[177] Greenberg Traurig, Second NPRM Comments at 17-18; BCNYS, Second NPRM Comments at 24-25; NFIB, Second NPRM Comments at 31-32; NYSHTA, Second NPRM Comments at 65-67.

[178] *Ibid*.

[179] BCNYS, Second NPRM Comments at 28; Lyft, Second NPRM Comments at 123-24.

[180] *See, e.g.*, Va. Code § 59.1-527(4) (including, as a factor counting against finding of unconscionably high prices, "whether the increase in the amount charged by the supplier was attributable solely to a regular seasonal or holiday adjustment in the price charged for the good or service.")

[181] *See, e.g.*, N.C. Gen. Stat. § 75-38(a)(3).

disruption periods. Because a seasonal safe harbor is not consistent with the statutory text or purpose, one cannot be created by regulation.

The statutory presumption rests on the Legislature's determination, reflected in the statutory text, that unjustified gross increases in price are inherently unfair.[182] This is why the statute penalizes the charging of unconscionably excessive prices "*during* any abnormal disruption of the market" rather than "*because of* any abnormal disruption of the market."[183] When a hurricane hits, sellers are under a positive obligation to not raise prices except to maintain pre-hurricane profit margins and/or accommodate increased costs even if, but for the hurricane, they would have raised prices anyway. The merchant who planned for a year to raise her prices for electric generators (with no cost justification) next February who is hit by a blizzard on the long-awaited price increase day is still barred from raising her prices because it is unfair to make excessive profits during a disruption whatever one's reason for doing so.

Retail sellers will appreciate this distinction intuitively: consumers at supermarkets in beach towns who might cheerfully pay additional amounts for "peak season" prices respond far more angrily if prices jump—purely to the profit of the seller—after a hurricane.[184] Thus, the statute requires sellers to restrain seasonal pricing fluctuations, except those justified by cost increases, when a disruption occurs even if seasonal pricing schedules would have led to the same result. Once the disruption ends, it will once again be lawful to impose pre-disruption planned price increases.

The Attorney General does not agree with those commentators who argue that prices in tourism-dependent locations fluctuate across all categories of essential products. There is evidence that hotel and transportation prices do,[185] but available evidence for other essential products in the scholarly literature is thin and commentators do not cite to any sources to support their assumptions. As the Staff Report discusses, evidence is stronger that price "stickiness" applies to seasonal-tourism-dependent areas in the same manner as it does in other areas, setting aside hotels and transportation.

Ride-hailing services are no different. Lyft points to the possibility that, for example, a sporting event might occur during an abnormal disruption and thus be a source of disruption in the market for rides separate and apart from, say, a contemporaneous hurricane.[186]

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[182] G.B.L. § 396-r(1).

[183] G.B.L. § 396-r(2)(a).

[184] *See* Daniel Kahneman et al, *Fairness as a Constraint on Profit Seeking*, 76 AM. ECON. REV. 728 (1986).

[185] *See, e.g.*, Subrata Kumar Mitra, *Estimating the duration of different seasons and their impact on hotel room prices*, 90 INT'L J. HOSPITALITY MGMT 102604 (2020); Xinrui Wang, Jiuxia Sun, Haizhen Wen, *Tourism seasonality, online user rating and hotel price: A quantitative approach based on the hedonic price model*, 79 INT'L J. HOSPITALITY MGMT 140 (2019) (examining data specific to Chinese New Year).

[186] Lyft, Second NPRM Comments at 122-23.

Setting aside the curious notion that a major event of this kind would continue notwithstanding a hurricane or other event of sufficient severity to trigger the statute, the arguments above apply here with the same force: the statute provides that what is acceptable surge pricing becomes unacceptable gouging when it coincides with an abnormal disruption.

As for national, international, and regional price fluctuations, the statute already provides an ample safe harbor for such variations by permitting sellers to increase prices to cover costs. If a retailer seller of gasoline must pay an extra $1 per gallon to the wholesaler owing to international market fluctuations, they are permitted to charge an extra $1 at the pump to recover that cost.[187] Commentators supply no explanation for why sellers who are *already* permitted to raise prices to cover costs are allowed by the statute to raise prices still further because of "the market" or "special events."

A general defense to *all* forms of price gouging liability for either seasonal fluctuations or regional or global market trends is also inconsistent with the statutory text and unhelpfully ambiguous. Even if there were a statutory basis for including such an exception, Commentators do not propose how to distinguish a price increase that aimed to increase profits from one justified by a "market fluctuation" from "price gouging."

The regulation, by contrast, builds on the statutory text to provide numerical guidance for businesses and enforcers: gross price increases over benchmark in excess of 10% during abnormal market disruptions unjustified by costs or profit margin maintenance are price gouging. If the seller experiences increased costs, then *whatever the source of the costs*, they can increase their prices to match. This numerical presumption provides "clear, practical guidelines" about unconscionably extreme prices.[188]

For a similar reason, the Attorney General rejected NYSHTA's proposal for a seasonal price increase defense based on historical data from past seasons.[189] NYSHTA provides no reason that hoteliers cannot suspend regular seasonal pricing increases for the duration of disruptions, and no explanation for how permitting such seasonal or "special event" increases during disruptions would be consistent with the statutory text.

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[187] For this reason, NYHSTA's proposal that rule 600.6 (really 600.7) be amended to include a defense when "the increase in price is directly attributable to additional costs imposed on it for goods or labor used in its business" is redundant.

[188] National Supermarket Association, Second NPRM Comments at 38-39. They stand in sharp contrast to the proposal of NYSHTA, which proposes to allow "other circumstances where it may be reasonable to allow price increases" such as "special events." NYSHTA, Second NPRM Comment at 66. What makes an event special?

[189] NHYSTA, Second NPRM Comments at 66.

Relative Frequency of >10% Price Changes Outside of Abnormal Disruptions in General

Several trade association commentators argued that the 10% gross disparity threshold risked penalizing price fluctuations that are not associated with disruptions, as many commodities fluctuate by 10% or more over short time periods under normal market conditions; if the purpose of the statute is to prevent price increases "tainted by respondents' use of the superior bargaining position attributable to the [disruption],"[190] they argue, a "gross" disparity must be qualitatively different than a disparity that one would expect in the ordinary course of business.

In the Staff Report that accompanied the Second NPRMs, OAG reviewed a large basket of essential goods and services and concluded that prices of these essentials, in general, did not change by 10% or more over the time window of past price gouging enforcements (30 days) *except* during periods of abnormal market disruption as defined by the statute.

Although certain commentators disagreed with the conclusions OAG drew, no commentator objected to the underlying analysis or any part of OAG's methodology. Instead, commentators largely responded by asserting that the evidence that prices of a wide basket of essential goods and services moved (by and large) by 10% or more only during disruptions did not establish "price gouging," characterizing such price changes are a "normal response to an abnormal market disruption that directly impacts the production of a commodity, rather than price gouging"[191] or responses to "changes in supply and demand."[192]

The text of the price gouging statute does not draw this distinction. It does not require the Attorney General show that the seller's price increases were abnormal, or that they were disconnected from supply and demand. The statute aims to eliminate sellers' use of "the leverage provided by the market disruption to extract a higher price."[193] The mechanism by which a seller acquires and uses this leverage is the change in supply and demand (which the statute calls a "change in the market") resulting from the triggering event. The prima facie case seeks to identify this leverage by first identifying a price increase so great that (by coinciding with the disruption) it at least raises the rebuttable inference that the seller is using the supply and demand imbalance caused by the disruption (i.e. leverage) to increase profits, which the Legislature has decided is unfair and should be

[190] *Two Wheel*, 71 N.Y.2d at 699-700.

[191] BCNYS, Second NPRM Comments at 28.

[192] API, Second NPRM Comments at 78.

outlawed. The question the regulation seeks to answer is what numerical increase raises that inference.

OAG's analysis concluded that prices for a wide variety of goods and services increase by greater than 10% from the pre-disruption benchmark in short time frames only during abnormal market disruptions. In other words, an increase of 10% or more from benchmark during the disruption is *prima facie* evidence that the seller is using the leverage provided by the abnormal disruption—that is, the disruption's creation of a supply/demand imbalance—to raise prices. This is of course only a *prima facie* case of price gouging, because the seller might be exercising that leverage to recover costs imposed on *it* by the exercise of that same leverage by its suppliers; price gouging is concerned only with profiteering from price increases, not price increases *per se*.

In a similar way, commentators' assertion that the 10% threshold does not comport with the statutory definition of "gross" because 10% is not "very great,"[194] ignores the essential context that OAG's analysis provides—namely, gross *in the context of changes in price over short periods of time of essential products*. Gross deviations vary on the context. A 10% change in outdoor temperature would surely not register as a "gross" disparity, but a 10% drop in the stock market is so serious a decline that it triggers a circuit-breaker that halts trading.[195] And here, the context of a "gross disparity" were the changes in price that the Legislature observed when it adopted the statute that evinced the use of market leverage generated by an abnormal market disruption. Indeed, as the Regulatory Impact Statement explained, the Legislature itself was responding to 10% month-on-month price increases arising out of Iraq-Kuwait conflict when it adopted the relevant provisions of the statute.

Several of the comments on this point appeared to contend that the statute requires a showing of common-law unconscionability in the pricing of the scrutinized good or service by postulating a moral difference between price increases that were "normal responses" to disruptions and those that were "gouging."[196] But the statute does not require a showing of common-law unconscionability. Instead, the price gouging statute provides that a price that is grossly disparate to the pre-disruption benchmark price is *per se* "unconscionably

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[194] API, Second NPRM Comments at 79 (referencing "gross negligence").

[195] *See* Nicholas Brady & Robert Glauber, *Circuit Breakers are doing their job, but don't close the markets*, NYSE.COM, https://www.nyse.com/article/circuit-breakers-are-doing-their-job-but-dont-close-the-markets (last accessed January 13, 2026).

[196] *See, e.g.*, BCNYS, Second NPRM Comments at 28 (distinguishing the 10% rule from New Jersey's statute because its "laws prohibit merely excessive price increases but not unconscionably excessive [prices]"); API, Second NPRM Comments at 78-79 (above-10% price increases "merely shows that a normal response to a market disruption includes price increases, not that sellers are gouging customers . . . there frankly is no 'community understanding' that 10% increases are unconscionable"). Insubstantial revisions to the Regulatory Impact Statement have been made to clarify that the evidence of other jurisdictional approaches provides evidence of legislative intent and harmonization benefits rather than statements about "community understanding."

excessive."[197] "Unconscionably excessive" is a defined term that bears the meaning assigned to it by the statute itself and does not import other concepts, including common-law unconscionability. It is not alone. Federal courts tasked with interpreting the phrase "unfair" in the Federal Trade Commission Act after Congress amended the statute to define "unfair" to incorporate a cost/benefit analysis have repeatedly held that the definition means that unscrupulousness or other concepts associated with unfair need not be proved to establish unfairness.[198]

One of the major advantages of the regulation as written is that it focuses the inquiry on objective indicia all businesses can understand: how much were prices raised? And how much of that raise is justified by actual increases in costs?

Relative Frequency of >10% Non-Disruption Price Increases in Specific Product Markets

Commentators pointed to what they believe to be examples of price fluctuations of greater than 10% outside market disruptions that would in their view support, at a minimum, the creation of distinct product-specific price disparity thresholds. Each is discussed below.

Hydroelectric Generators

API presents a chart of fluctuations for the day-ahead prices of the St. Lawrence generator. Noting that the St. Lawrence generator is run by a state-appointed board, API argues that if 10% gross disparities are price gouging, then the government is price gouging by permitting the St. Lawrence generator to charge grossly disparate prices (as much as 500%) to utilities across short time periods.[199]

API's submission on hydroelectric prices was already considered and rejected in the Staff Report issued alongside the revised proposed rules.[200] As the Report explained,

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[197] G.B.L. § 396-r(3)(b) ("In any proceeding commenced pursuant to subdivision four of this section, prima facie proof *that a violation of this section has occurred* shall include evidence that [] the amount charged represents a gross disparity between" the pre- and post-disruption price); *see also Quality King*, 209 A.D.3d at 79 ("The third element of a price-gouging claim that the AG must establish is that the good was sold (or offered for sale) for an unconscionably excessive price, which must be demonstrated by an unconscionably extreme amount of excess in price, an exercise of unfair leverage or unconscionable means, or both. *To make a prima facie showing of this element*, the AG must submit evidence establishing that the amount charged during the period of market disruption represents a gross disparity between the prices of the [essential] product and the price at which the product was sold or offered for sale by [the seller] in the usual course of business immediately prior to the onset of the abnormal disruption of the market" (emphasis added)).

[198] *See, e.g.*, *F.T.C. v. Wyndham Worldwide Corp*., 799 F.3d 236, 244 (3d Cir. 2015); *Fed. Trade Comm'n v. Walmart Inc*., 664 F. Supp. 3d 808, 834 (N.D. Ill. 2023).

[199] API, Second NPRM Comments at 78-79.

[200] API did not provide the data undergirding this chart; OAG reviewed independent data sources for the same time-ahead charges and was not able to replicate API's chart.

because *all* consumer and small business electricity prices are set by direct price controls via a fairness determination of the Public Service Commission,[201] the pricing behavior of wholesalers becomes constrained in complex ways.

Direct price controls render the leverage created by the supply-demand imbalance caused by the abnormal disruption different in kind (if it exists at all) from the leverage created in the usual case where there is no direct price control scheme. This result is similar to that produced by the scheme that prevailed for gasoline sales in the United States for some decades. There too the government directly fixed the consumer price of gasoline during abnormal disruptions, and there price gouging law was held not to apply.[202]

API's responded to the Staff Report's analysis by characterizing the wholesale electricity market as merely "highly regulated," making it an appropriate barometer of "community understanding" of what a gross disparity might be.[203] But the wholesale electricity market to which the St. Lawrence generator contributes is not merely *highly regulated*; it is subject to market-wide *state-set price caps*. It is the presence specifically of price caps on *all* downstream sales, rather than merely the imposition of regulation in general, that alters the pricing behavior of upstream sales such that one cannot infer the presence of disruption-supplied leverage in the market from upstream price increases.

The same would not be true of, for example, the brand and generic pharmaceutical market, discussed below. Although these market is also highly regulated, because pharmaceutical *prices* are not subject to direct market-wide government ratemaking, it is possible to identify characteristic price-and-profit spikes resulting from disruption-created leverage.

Nor is it correct to assert that OAG is aiming to identify whether a 10% increase is "unconscionable." The statute has already done that by linking the finding of unconscionably extreme prices to the identification of gross disparities in G.B.L. § 396-r(3)(b), which the Court of Appeals has explained is a prices characteristic of an exploitation of abnormal disruptions to increase profits.[204]

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[201] Public Service Law § 65(1); *compare Gen. Tel. Co. of Upstate New York v. Lundy*, 17 N.Y.2d 373, 384 (1966) (rate inquiry turns in part on "whether profits are fair rather than excessive") *with* G.B.L. § 396-r(1) (purpose of statute "to prevent any party within the chain of distribution of any goods from taking unfair advantage of the public during abnormal disruptions of the market"). *See generally Abrams v. Pub. Serv. Comm'n*, 67 N.Y.2d 205, 212 (1986) (describing considerations in rate-making determinations of the Public Service Commission).

[202] *State v. Strong Oil Co., Inc*., 105 Misc.2d 803, 818 (Sup. Ct., Suffolk County 1980).

[203] API, Second NPRM Comments at 78-79.

[204] *Two Wheel*, 71 N.Y.2d at 699-700.

Brand and Generic Pharmaceuticals

The Healthcare Distribution Alliance, representing pharmaceutical distributors, argued that normal course price fluctuations specific to the pharmaceutical industry were such that a "gross disparity" could not be presumed from less than a 20% increase in price from pre-disruption price in brand medication sales, and a 25% increase in price from pre-disruption price for generic medication sales. Either pharmaceuticals should be excluded from the statute wholesale, the trade association concluded, or these higher caps should apply to medication.[205]

This comment is materially identical to comments made by the HDA in the last round of rulemaking. The Attorney General addressed the issues raised in those comments in the Regulatory Impact Statement to the proposed rule. In that Statement, the Attorney General noted a recent authoritative study from the U.S. Department of Health and Human Services ("DHHS") that contradicted HDA's assertions.[206] In that study, DHHS observed that of the 3,000 drug price increases observed between 2016 and 2022, only 8% of those increases were "significant," a term which the DHHS defined as reflecting a price increase of 10% or more.[207] Adopting the same 10% threshold therefore harmonizes with the DHHS definition.

That 92% of all drug price increases were less than 10% *year on year* suggests a >10% price increase is a gross disparity when measured on the more usual month-to-month basis that will be at issue in most price gouging investigations, particularly those announced by FDA shortage reports. Even if the 8% of drugs with >10% increases were thought to be a basis to object to this threshold, that 8% outlier is now subject to section 139101 *et seq* of the Inflation Reduction Act.[208] That law is intended to restrain drug price increases that exceed inflation (which, as described above, increases on a month-to-month basis far less than 10%),[209] by requiring drug manufacturers to pay back overcharges as rebates, functionally eliminating gross disparities in price at least as charged to consumers over the

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[205] HDA, Second NPRM Comments at 61-64.

[206] *See* U.S. Dep't of Health and Social Services, *Inflation Reduction Act Research Series: Medicare Part B Inflation Rebates in 2023* (Dec. 14, 2023), https://aspe.hhs.gov/sites/default/files/documents/7135bf0b04310aaf69f8c5f3029c4b05/ira-medicare-part-b-rebate-factsheet.pdf.

[207] Arielle Bosworth et al., *Price Increases for Prescription Drugs*, U.S. DEP'T OF HEALTH AND HUMAN SERVS. (Sept 30, 2022), https://aspe.hhs.gov/sites/default/files/documents/e9d5bb190056eb94483b774b53d512b4/price-tracking-brief.pdf.

[208] 42 U.S.C. §§ 1395m(z); 1395w-114b.

[209] The annual rate of inflation in 2023, the first year in which the Act was in effect, was 3.1%. Bureau of Labor Statistics, *Consumer prices up 3.1 percent from January 2023 to January 2024*, TED: The Economics Daily, https://www.bls.gov/opub/ted/2024/consumer-prices-up-3-1-percent-from-january-2023-to-january-2024.htm (Feb 22, 2024).

rebate time horizon.[210] HDA does not address this analysis or provide evidence to the contrary.

Ride-Hailing Services

Uber and Lyft argue that because their services engage in dramatic price fluctuation on a regular basis from non-disruption events, it follows that similar fluctuations during a disruption do not indicate a use of the leverage generated by the disruption to increase profits. Both companies propose, as an alternative to the 10% threshold, a rule that would find a prima facie gross disparity only if a ride-hailing provider activated a "surge" or "prime time" price for trips above a certain threshold. Lyft suggests a 1.5x threshold is appropriate; Uber, 3.0x.[211]

The Attorney General has carefully reviewed these comments, analyzed their underlying data, and agrees with them in part. The central issue Uber and Lyft identify is not so much the application of the 10% threshold itself (versus some other percentage threshold) but the pre-disruption price to which the threshold is to be applied. The proposed rule on that subject requires revision, has been withdrawn, and will be re-proposed shortly. Because the statute directs that the price of each post-disruption ride must be measured by the price the seller charged for the service "in the usual course of business immediately prior to the onset of the disruption," the pre-disruption price must take into account the independent variables applicable to each particular ride that go into making up that ride's price.

As explained in the Revised Regulatory Impact Statement to this rule, the factors that make up the price of a taxi ride are matters of public record, as are the prices of every taxi ride that actually takes place in New York City. Using this data and a method described in the Staff Report to match each taxi ride to its closest comparator ride based on those independent variables, OAG found that taxi ride prices also exhibit <10% price stability at essentially all times (not just in disruptions).

This analysis is surely possible for Uber and Lyft but the necessary data, both about the characteristics of the relevant rides and the factors that make up Uber's and Lyft's pricing algorithms, are not matters of public record at least at the necessary level of precision to permit a closest comparator analysis by OAG for purposes of this rulemaking. That Uber and Lyft have business practices outside of disruptions that lead to price

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[210] *See* U.S. Dep't of Health and Social Services, *Inflation Reduction Act Research Series: Medicare Part B Inflation Rebates in 2023* (Dec. 14, 2023), https://aspe.hhs.gov/sites/default/files/documents/7135bf0b04310aaf69f8c5f3029c4b05/ira-medicare-part-b-rebate-factsheet.pdf.

[211] Lyft, Second NPRM Comments at 124-25; Uber, Second NPRM Comments at 162-165.

variability does not mean there is no pre-disruption price or price algorithm from which to measure. Although it may lead to more complex factual analysis in any investigation or enforcement action, Uber and Lyft have not shown that *when the proper benchmark is employed* the presumptions that undergird the 10% rule for every other industry and for taxis do not apply with equal force to the entire for-hire ground transportation market.

The Attorney General further reviewed the other state statutes cited by Uber and Lyft as well as concerns regarding the application of the cost-based defense to the prima facie case and other concerns involving the 10% rule. For the reasons described in the alternatives section of the Revised Regulatory Impact Statement, the Attorney General did not consider these comments to justify modifying the 10% rule in the manner proposed.

Applying a Surge Multiplier Paradigm to the Gross Disparity Threshold Specific to For-Hire Vehicle Providers

Separate and apart from their request for a far higher price increase threshold presumption than other products, Uber and Lyft also both propose that OAG articulate the rule differently for ride-hailing companies by expressing the 10% rule as a cap on "surge" pricing versus the "base fare" charged by those companies for rides.[212]

This comment is primarily directed at the proposed rule set out in LAW-06-25-00005-P, which has been withdrawn so that it may be reproposed imminently. Uber and Lyft's comments do not provide sufficient justification to disregard the statutory requirement that the "price" be the subject of the price gouging analysis rather than an arbitrary component of the price. Such a model also presumes, wrongly, that all ride-hail providers structure their fares in the same way as Uber and Lyft. Creating a two-company exception to rules that would apply differently to providers who choose to use a different fare structure inhibits competition, complicates enforcement, and may facilitate evasion.

Creation of Ride-Hail Shortages

Uber comments that the imposition of the 10% rule would lead to ride-hail shortages during emergencies.[213] This comment has been substantially addressed elsewhere; the cost rule permits the charging of surge prices to manage demand so long as they do what they

[212] *See* Uber, Second NPRM Comments at 144; Lyft, Second NPRM Comments at 117-18 (describing fare structures). Lyft, in its comment, asserts that it "does not believe [the lack of definitions is] an insurmountable hurdle[] to a cap-based price gouging rule," but does not substantiate this claim by providing a definition of its own. Lyft, Second NPRM Comments at 125 n. 12. The discussion that follows therefore addresses Uber's submission, which discusses the definition problem.

[213] Uber, Second NPRM Comments at 151.

say they do—encourage drivers to hit the roads by channeling the extra charges from surge to drivers or to other additional costs consistent with the law.

Statutory Authority

The American Petroleum Institute argues that adoption of the rule exceeded the Attorney General's regulatory authority for the reasons discussed in Comments Applicable to Multiple Rules, above.[214] The Attorney General comments the proposed rules fall well within the ambit of the Attorney General's authority for the reasons discussed in the Attorney General's response to Comments Applicable to Multiple Rules, above.

As regards the 10% rule specifically, API compares the rule to draft legislation advanced by then-Attorney General Elliot Spitzer in 2006 that would have formally amended the statute to provide for a 25% gross disparity threshold.[215] The Attorney General considers the 2020 Legislature, responding to a renewed spate of price gouging in the wake of COVID-19, to have chosen a different path that provides the Attorney General with more discretion and authority than AG Spitzer's proposal advanced under the different circumstances that existed in 2006.

The 2020 amendment that empowered the Attorney General to make rules to effectuate and enforce the statute fundamentally altered the legislative scheme by permitting, for the first time, regulations that would specify with more precision the various prohibitions in the statute.

It is not correct that the 10% threshold is a new factor for the court to consider; it is instead a definition of "gross disparity" that, as the *Quality King* Court explained, serves to establish the unconscionable price factors *prima facie*.[216] Nor is the selection of a 10% figure a value judgment, as discussed above. Instead, the 10% figure, through examination of empirical data, expresses and instantiates the policy judgment of the Legislature in the statute.

The Legislature's selection of a broad standard for "gross disparity" does not demonstrate legislative intent to preclude rulemaking to more precisely define what a gross disparity would mean.[217] A "general statutory power," combined with a grant of rulemaking

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[214] API, Second NPRM Comments at 75-80.

[215] See OAG, Spitzer Authors Bill to Strengthen Price Gouging Law (Jan 10, 2006), https://ag.ny.gov/press-release/2000/spitzer-seeks-stronger-milk-price-gouging-law (referencing Assembly Bill No. A10722 [2005-06 Session], available at https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A10722&term=2005&Summary=Y&Actions=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y).

[216] *People v. Quality King Distributors, Inc.*, 209 A.D.3d 62, 79 (1st Dep't 2022).

[217] API, Second NPRM Comments at 76.

authority, permits "those who are to act under such general provisions to fill up the details."[218] The definition of "gross disparity" is such a detail.

Relevance of the Milk Price Statute to the Price Gouging Statute

The API argues, based on G.B.L. § 396-rr, a price gouging statute specific to the milk industry, that if the Legislature had intended to impose a percentage presumption for a gross disparity it knew how to do so and so by implication no percentage could be applied here.[219]

The Attorney General does not agree with this comment. The milk statute does not, as commentators claim it does, provide that a "gross disparity" means a 200% increase. Instead, it provides that if the Agriculture Commissioner has established a minimum milk price *and* "such state ordered minimum price is higher than the price set for milk within the state pursuant to the New York-New Jersey milk marketing order, *or* at any time . . . the retail price of fluid milk exceeds 200% of the price for class I fluid milk" (emphasis added) the Agriculture Commissioner may initiate an investigation into milk prices and refer to the Attorney General any instances where, among other things, "the price charged at retail for fluid milk represents a gross disparity between the raw milk price paid to producers plus a reasonable handler's processing and distribution charge and the price at retail" not justified by costs.[220] The 200% disparity is one of a pair of equally sufficient triggers for an investigation; it is not a definition of "gross disparity."

Although the federal district court in *Greater N.Y. Metro. Food Council v. McGuire* asserted that "one possible reading of the milk pricing law" would be that "gross disparity" in the above text to mean 200% increases, the Court "emphasi[zed] that this reading of the statute is not a holding that the statute must be so read."[221] The Attorney General respectfully disagrees with this non-precedential construction of the statute; to hold that "gross disparity" means a 200 percent disparity would read one of the two *alternative* triggering conditions for a price investigation—a minimum price higher than the NY-NJ marketing order—out of the statute.[222]

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[218] *Boreali v. Axelrod*, 71 N.Y.2d 1, 10 (1987).

[219] *Greater N.Y. Metro. Food Council v. McGuire*, 815 F. Supp. 706, 711 (S.D.N.Y. 1993); *cited in* API, Second NPRM Comments at 72-73.

[220] G.B.L. § 396-rr.

[221] *Greater N.Y. Metro Food Council v. McGuire*, 815 F. Supp 706, 711 (SDNY 1993), *aff'd* 6 F3d 75, 77 (2d Cir 1993).

[222] *Cf. Matter of OnBank & Trust Co*., 90 N.Y.2d 725, 731 (1997) (the courts "decline to read [an] amendment in such a way as to render some of its terms superfluous"); *see also* McKinney's Cons Laws of NY, Book 1, Statutes § 144 ("Statutes will not be construed as to render them ineffective").

Instead, "gross disparity" in the milk price gouging law must be read in the specific context of the statute, which unlike the general price gouging statute is not concerned with the unfair exploitation of disruptions but with the potential for milk price cuts to be captured by middlemen rather than benefiting consumers.[223] A gross disparity in that context could well be more—or less—than a "gross disparity" in the context of disruptions. Thus the meaning given to the term in the milk law is not a helpful guide to construction of the price gouging law.

Consistency with Caselaw

Commentators pointed to existing caselaw that, they argued, illustrates that a "gross disparity" has been understood as applying to price disparities greater than 10%.[224] But no prior case has opined on the lower bound of the "gross" disparity language. Instead, most courts reviewing the factual record assembled by OAG have chosen from among thousands of above-10%-disparities specific disparities that appear particularly egregious—for example, in *Quality King*, the 75% jump in prices charged to Clinton Variety (a retailer) by Quality King for Lysol wipes 35 days following the onset of the COVID-19 disruption.[225]

In *Two Wheel*, the Court of Appeals rejected the contention that "gross disparities in price" required "extremely large price increases." The Court affirmed that a price gouging enforcement could be brought even though "for some of the sales during the period, the sales price exceeded the base price by less than 5%; for others the differential fell between 5 and 15%. In fact, in the vast majority of the sales, the prices were inflated by less than 30%. In only five sales, according to the Attorney-General's figures, did the disparity reach as high as 60%."[226] A presumptive threshold for the finding of a gross disparity at 10% is a reasonable construction of the statutory language and is supported by the Court of Appeals' authoritative opinion on this subject.

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[223] *See* Governor's Mem approving L. 1991, ch 84 ("It has long been the policy of this State to support a local dairy industry for the health and economic benefit of all the State's citizens. Those benefits are currently threatened due to a dramatic decline in prices being paid to farmers as a result of declining federal support levels. . . . This bill authorizes the Commissioner of Agriculture and Markets to provide immediate price relief to dairy farmers and accelerates the process for determining a petition for long-term relief . . . In the same period that prices have been declining to farmers, the prices charged to consumers in many parts of the State have not been reduced. In response to this problem the bill provides important consumer protection against excessive retail pricing of milk.")

[224] Commentators cited *Quality King*, 209 A.D.3d at 80 (examples of gross disparities referenced by the court ranged from 33% to 85%); *People v. My Service Center, Inc.*, 14 Misc. 3d 1217(A) (Sup Ct, Westchester County 2007) (price increases found unlawful ranged from 31% to 48%); *People ex rel. Vacco v. Beach Boys Equipment Co.*, 273 A.D.2d 850, 851 (4th Dept 2000) (unlawful price increase of 100%); *State v. Strong Oil Co.*, 105 Misc. 2d 803, 824 (Sup Ct, Clinton County 1980) (collecting examples of prices held unlawful at common law featuring increases of at least 100%).

[225] *Quality King*, 209 A.D.3d at 66-67.

[226] *Two Wheel*, 71 N.Y.2d at 698.

Use of Other States as Justification for 10% Threshold

The API objects to the Attorney General's comparisons of the 10% rule to other price gouging laws, noting that a plurality of States does not impose any numerical caps, and that the States that do impose a 10% cap apply for more limited time periods—namely the duration of government emergency declarations rather than the duration of the abnormal disruption.[227] The Business Council of New York argued that Pennsylvania, which shares a lengthy border with New York, has a 20% presumptive threshold such that 20% would promote more cross-border regulatory harmonization than 10%.[228]

The Attorney General has reviewed the statutes in question. Although many states with a 10% cap employ a declaration-based method of determining when the statute applies, it does not follow that those states' statutes apply for a more limited period or that the New York statute applies for "periods that could last years, such as 'war'".[229] The price gouging statute applies only to periods of *abnormal market disruption* that *result from* a list of triggering events. Such disruptions may well be far shorter or longer than the government declaration of emergency has effect. The difference in abnormal disruption period determination does not make New York's laws and other states' laws inapt comparators.

Application to New Products

The API argued that the 10% threshold would "stifle innovation" by discouraging businesses from introducing new products. This comment is most squarely targeted to rule 600.8, and is addressed in the assessment of comments to that rule.

[227] API, Second NPRM Comments at 77.

[228] BCNYS, Second NPRM Comments at 28.

[229] API, Second NPRM Comments at 77.

LAW-06-25-00009-P – New Products (13 N.Y.C.R.R. § 600.8)

Lawfulness of Rules Concerning New Products

The American Petroleum Association comments that this rule would "expand the scope of the statute to new products., creating a whole cloth new category of products that were not sold prior to the disruption and making them subject to the statute."[230] The Attorney General disagrees with the premise of this comment. New products not sold prior to the disruption have always been within the scope of the statute; the rules do not change this.

The statute applies to all "goods and services vital and necessary for the health, safety, and welfare of consumers or the general public."[231] API is correct that G.B.L. § 396-r(3)(b)(i) requires a showing of a gross disparity between a pre-disruption and post-disruption price and thus is generally not applicable to products that were not sold or offered for sale prior to the disruption, but the same limitation does not apply to G.B.L. § 396-r(2)(a), which generally prohibits unconscionably extreme price excesses or the use of unfair leverage or unconscionable means, or G.B.L. § 396-r(3)(b)(ii), creating presumptions applicable to trade area price disparities without requiring examination of a pre-disruption sale or offering for sale.

The 2020 amendment to the statute underscored its application to new products. It is common ground that the mRNA COVID-19 vaccine was not available prior to the onset of the disruption. It is not credible to conclude that the Legislature's amendment to "broaden[] its application to . . . medical supplies and services to treat, cure, or prevent disease or illness,"[232] and further amendment to apply to *any* drugs that were the subject of a reported shortage,[233] intended to permit the COVID-19 vaccine or similar novel cure to be sold for an unconscionably extreme price or a grossly excessive price on the grounds that it was new. Instead, as the rule explains, the statute provides multiple additional avenues for new products to fall into its ambit other than G.B.L. § 396-r(3)(b)(i). The rule aims to effectuate and enforce these provisions in this important context, consistent with the Legislature's focus on COVID and the possibility of gouging prices charged for life-saving medications.

[230] API, Second NPRM Comments at 81.

[231] G.B.L. § 396-r(2).

[232] L. 2020, Ch. 90 (Assembly Sponsor Memorandum at 2).

[233] L. 2023 ch. 725.

Effects on Innovation

The Business Council of New York, American Petroleum Institute, and others expressed concern that the application of the price gouging law to new products would discourage the creation or marketing of new products designed to respond to the exigencies of that disruption, harming consumers.[234]

As discussed above, the price gouging law by its terms applies to new products. The Attorney General is bound by the statutory text and purpose. Accordingly, the proposal of carving out a blanket exception for "new" products must be rejected.[235]

It is notable in this connection that the COVID-19 vaccine—praised by commentators as a prime example of disruption-based innovation of the most extraordinary kind—was both invented and distributed despite the charging of what all appear to have agreed was a non-gouging price for the duration of the pandemic's acute phase.[236] At least in this case, price gouging laws and innovation appear to have combined to ensure the rapid development of new technology at a non-gouging price.

Definition of Comparable Product and Profit Margin

The American Petroleum Institute expressed concerns that the proposed rule's use of the phrase "comparable product" rested on "subjective judgments that cannot be determined with any certainty prior to potential enforcement action."[237] The Attorney General does not agree. As the Regulatory Impact Statement explains, the first two sources of comparable products are those chosen *by the seller* to price or develop the new product—an objective fact ("did you compare these products?") that a seller necessarily knows before any enforcement proceeding. The third, the "acceptable substitute" criteria, is derived from antitrust law.[238]

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[234] BCNYS, Second NPRM Comments at 28; API, Second NPRM Comments at 81-82.

[235] *See, e.g.*, BCNYS, Second NPRM Comments at 28 (implicitly calling for such an exclusion, arguing that the "addition" of new essential products "introduces more ambiguity" and criticizing the *statutory* text as "vague"); API, Second NPRM Comments at 81 (similar). In a footnote, API asserts that the rule does not permit the recovery of R&D costs because "the Proposed rule says the price of a new essential product is excessive" if it exceeds by 10% the price of a comparable product "regardless of profit margins." That is not correct. As set out in subdivision (c)(2) of the rule, the 10% excess triggers only a *presumption* of gouging that can be rebutted by showing that costs or profit margins justify the increase in prices. As rule 600.9 now makes clear, R&D costs are costs that are necessary to the lawful and prudent provision of a new product.

[236] *See* Donald W Light & Joel Lexchin, *The costs of coronavirus vaccines and their pricing*, 114 J. ROYAL SOC'Y OF MED. 502 (2021).

[237] API, Second NPRM Comment at 81.

[238] *See Global Reins. Corp. U.S. Branch v. Equitas Ltd*., 18 N.Y.3d 722, 732 n. 8 (2012); *Todd v. Exxon Corp*., 275 F.3d 191, 202 (2d Cir. 2001) (Sotomayor, J.).

The API argues that it was unclear whether a comparable pre-disruption product would be the vaccine for another disease (whether that vaccine was itself effective in the treatment of COVID-19) and, if so, which disease would be the appropriate analogy given COVID-19's arguably unique characteristics. OAG addressed this comment at length in footnote 78 of the Regulatory Impact Statement.[239] OAG has moved the text of that footnote to main text in the revised Regulatory Impact Statement.

[239] Proposed Rule 600.7600.8, Regulatory Impact Statement at 23.

LAW-06-25-00012-P – Cost Definition and Allocation Methods (13 N.Y.C.R.R. § 600.9)

For the sake of readability in what follows, costs that would fall within the G.B.L. § 396-r(3)(c)(2) definition will be referred to as "statutory costs" and costs that do not meet that definition will be referred to as "excluded costs."

Utility of Affirmative Cost Defense

Several commentators, including the National Supermarket Association, Healthcare Distributor Alliance, and Uber, while expressing general support for cost-based justifications, argued that the cost-based justification was of limited practical utility because it is an affirmative defense; it would only be provable after much time and expense in litigation devoted to the prima facie case or would not be readily provable by small businesses.[240] These commentators make various proposals to address this perceived problem, most usually requesting a wholesale exemption for particular industries from price gouging scrutiny,[241] or, in the case of Uber, permission to charge prices of up to 300% above benchmark during life-threatening emergencies.[242]

These comments do not reflect the practicalities of price gouging enforcements. The Attorney General brings price gouging enforcements as CPLR Article 4 special proceedings.[243] A special proceeding essentially skips to the summary judgment stage of a litigation such that, except in extraordinary or egregious cases, no enforcement is filed without being preceded by a subpoena seeking, among other things, evidence about cost-based justifications. Defendants have ample opportunity to articulate a cost-based justification to OAG in this process. Although businesses are of course permitted counsel for these investigations, more than a few small businesses have resolved OAG inquiries successfully without them or resolved our concerns through our informal consumer mediation program.

Subpoena document requests are practical and call for production of the documents a business already has, above all records of sales and copies of invoices, both of which are usually available in readily accessible electronic form as part of a business's ordinary operations. Indeed, documentation of costs and sales are fundamental to any business. If a

[240] *See* National Supermarket Association, Second NPRM Comments at 38-39; HDA, Second NPRM Comments at 62-63; Uber, Second NPRM Comments at 153.

[241] *See, e.g.*, National Supermarket Association, Second NPRM Comments at 38-39; HDA, Second NPRM Comments at 62-63 (blanket permission to raise prices up to 20% or 25% above benchmark).

[242] Uber, Second NPRM Comments at 162-67.

[243] *See, e.g.*, *People v. Quality King*, 209 A.D.3d 62, 74 (1st Dep't 2022).

business can do its taxes—which also require cost and profit calculations—it can respond to a price gouging inquiry.

The burden to rebut a prima facie case exists independently of the regulations. To the extent that the regulations modify the burden at all, they decrease it by helping businesses identify what is and is not relevant to the defense—and provide certainty by expressly permitting businesses to use their own usual course of business accounting methods when doing so is permitted by the statute.

Purported Limitation of Evidence Used for Additional Costs Defense

The American Petroleum Institute comments that the rule is *ultra vires* or unconstitutional because it "purports to limit the availability of—and the evidence that may be used to support—the statutory 'additional costs' defense."[244] Lyft makes a similar comment.[245]

As the revised Regulatory Impact Statement explains, this rule does not limit the availability of any defense or evidence that may support it but instead sets out with precision the meaning of the statutory phrase "additional costs not within the control of the defendant were imposed on the defendant for the goods and services" or maintenance of margins of profit. If, as Lyft postulates, the statute permits *other* affirmative defenses, then the rule does not touch on them. It provides guidelines a number of regulated entities asked for on how to show their statutory costs justified their price increases if that is the defense a seller chooses to employ.[246]

Insofar as the regulation clarifies that certain costs are not within the statutory definition, it is merely articulating examples of what the statute already excludes. If *any* cost was an acceptable basis for the defense, the statute would have just said "costs." Instead, it provided four criteria a cost must meet to satisfy the defense: it must be "additional," "not within the control of the defendant," "imposed on the defendant" and "for the goods and services." Those costs described in the regulation as "excluded costs" are items do not meet

[244] API, Second NPRM Comments at 80-81.

[245] Lyft, Second NPRM Comments at 125-28.

[246] Lyft describes a purported right of a defendant to "present additional evidence . . . rebutting causation . . . or any other applicable defense." Lyft, Second NPRM Comments at 126. This rule has no bearing on such rights given that what Lyft is describing appears to be examples of defenses, not affirmative defenses. A defense aims to undermine elements of a plaintiff's case and goes to whether the plaintiff's case is proved on a preponderance of the evidence. This rule does not touch on evidence that may be presented as a defense.

one or more of the four statutory criteria, for reasons set out in detail in the Regulatory Impact Statement, and thus, facilitate compliance.[247]

The regulation goes on to provide methods, drawn from accounting practices widely used by businesses across the economy, for businesses to calculate their additional costs, again being attentive to the specific statutory limitations on countable costs consistent with the Attorney General's authority to promulgate regulations.[248] For further discussion of comments concerning whether the regulation is within the Attorney General's powers, see the Attorney General's discussion of these concerns in the assessment of Comments Applicable to Multiple Rules, above.

API's comment does consider changes in the re-proposed regulation from its previous iteration. It is not correct, for example, that the revised regulation "limit[s] a seller's reliance on index pricing."[249] The Regulatory Impact Statement says otherwise: "Once again, the rule does not forbid the use of index prices in the affirmative defense."[250] Although API's comment suggests that doing so is an exercise in futility, further clarification has been added to the Regulatory Impact Statement to underline this point.

The API also comments that "replacement costs were omitted from the proposed definition." It is mistaken. Per the Regulatory Impact Statement: "The rule expressly permits the counting of the purchase of replacements as a statutory cost."[251] API's comment appears to conflate replacement value accounting—which in some iterations presents challenges for price gouging analysis if the replacement value is hypothesized rather than reflective of actual purchases—and accounting for the value of replacements for which obligations have or necessarily will be undertaken, which is a statutory cost. The Regulatory Impact Statement has been insubstantially revised to better express this distinction.

Reasonable, Good Faith Cost Timing and Necessity Estimations

The Food Industry Alliance of New York, the New York Association of Convenience Stores, and the Consumer Brands Association all draw attention to the risk that a seller who is attempting in good faith to comply with the statute may have no choice, especially during

[247] Lyft appears to object to the migration of language concerning the details of proof for the affirmative defense from what was once the "dynamic pricing" rule in a previous proposal to the cost rule. *See* Lyft, Second NPRM Comment at 126-27. No substantive change was intended. Instead, the entire rulemaking rests on the premise that, there being no difference in kind in the statute between "dynamic" and staid pricing, there should be no such difference in the rules. Thus a dynamic pricer that identifies the correct comparator under what is now rule 600.4 must, like all other pricers, turn to rule 600.9 to properly calculate their costs.

[248] *Matter of Gen. Elec. Capital Corp. v. New York State Div. of Tax Appeals*, 2 N.Y.3d 249, 254 (2004).

[249] API, Second NPRM Comments at 80.

[250] Proposed Rule 600.9, Regulatory Impact Statement, at 40.

[251] *Ibid*.

the exigencies of a disruption, but to make an intelligent guess about their impending cost increases to price their goods appropriately and may then inadvertently expose themselves to price gouging liability if they guess wrong.[252]

The statute precludes a subjective "good faith" projected costs defense. Indeed, attempts to justify price increases based on anticipated costs have already been rejected in court. In *People v. My Service Center*, the gas station defendant seller "claim[ed] it was forced to anticipate increased delivery fees and raise its market prices or risk a shortfall of funds, rendering it unable to purchase gasoline on its next shipment date."[253] Rejecting these "conclusory assertions that [the seller's] price increases were warranted based on its current and prospective perceptions of market conditions," the Court held that "hiking the pump price to its consumers, notwithstanding the price at which it purchased that supply, is precisely the manipulation and unfair advantage [the statute] is designed to forestall."[254]

Under subdivision (b)(5)(iii) of the rule, a seller's *objectively* reasonable belief that a cost is necessary is sufficient basis for the seller to seek to recover those costs. Nonetheless, the use of accrual rules permits sellers that have (for example) contracted to pay sums certain to recover those costs when they accrue, not necessarily when they are paid in cash. The Attorney General comments these sections address commentators concerns to the extent the statute permits.[255]

Whether Government-Imposed Costs are Statutory Costs

Several commentators expressed concern that costs incurred by a business in response to regulatory or legislative actions, including changes in taxation, government surcharges such as congestion pricing, and regulatory mandates that require expenditures (such as health insurance mandates, minimum wage increases, and so on), were not sufficiently clearly described as statutory costs in the regulation.[256] Commentators suggested clarifying the regulation to underscore that such regulatory costs were statutory costs.

The Attorney General accepted these suggestions. As described in the Regulatory Impact Statement, government charges are the paradigm of statutory costs, whether direct (e.g. taxes) or indirect (e.g. changing processes to comply with a new regulatory mandate).

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[252] FIA, Second NPRM Comments at 34; NYACS, Second NPRM Comments at 37; CBA, Second NPRM Comments at 44.

[253] *People v. My Service Center*, 14 Misc.3d 1217(A), at *2 (Sup. Ct., Westchester County 2007).

[254] *Id*. at *4.

[255] NYCAS, Second NPRM Comments at 37.

[256] *See* BCNYS, Second NPRM Comments at 28; NFIB, Second NPRM Comments at 32; FIA, Second NPRM Comments at 35; CBA, Second NPRM Comments at 44-45.

The Attorney General agrees that there was at least some potential confusion as to whether compliance costs were statutory and thus clarification was warranted.

Accordingly, the Attorney General has made insubstantial changes to underscore that government charges are costs outside of the control of the seller. First, to simplify the relevant calculations and to reflect the reality that the "charges" are coming from a party other than the seller, when the government directly taxes the sale, that tax may be excluded from the price calculation altogether; this was achieved by amendment to rule 600.1. Second, when the charge is imposed on the seller rather than the sale, rule 600.9 has been amended to underscore that these taxes and fees are statutory costs that can and should be allocated in the usual way.

That said, it is a rare regulatory cost that is exclusively born by a single product in question, and such regulatory costs must be attributed among the affected products so that the essential product in question bears only its proportionate share of the statutory cost based (in almost all cases) on the seller's own cost allocation methods adopted on a clear day.

Hazard Pay, Logistical Costs, and Other Statutory Costs

Other commentators pointed to potential sources of costs that were not regulatory or prudential but that they were concerned the regulation did not consider to be statutory costs. For example, the New York Association of Convenience Stores identified "higher expenditures on overtime labor, hazard compensation, and logistical challenges" as "legitimate cost increases retailers encounter during crises."[257] Professor Giberson pointed to "hazard pay, rush delivery, or refrigeration" as costs that "could be disallowed under the rule's current framing."[258] Other examples included insurance premiums and health and safety precautions.

The Attorney General has made an insubstantial change to the rule to clarify that a cost is necessary to the production of an essential product when incurring it is necessary for the "lawful and prudent" provision of the product. Insurance, utilities, wage increases, and regulatory compliance measures all fit within this definition. So do costs implementing health and safety measures that are prudential even if not required by regulation, or, to use one example from commentators, switching from in-person to online delivery during a pandemic or retooling production or restocking shelves to better accommodate different essential products.[259]

[257] NYCAS, Second NPRM Comments at 36.

[258] Michael Giberson, Second NPRM Comments at 15.

[259] CBA, Second NPRM Comments at 45.

As rule 600.9 now makes clear, overtime labor and hazard pay are included as legitimate "labor costs" that businesses can recover. "Logistical challenges" described by commentators are less clear, but if this phrase describes cost increases for goods or services that are necessary for the lawful and prudent provision of essential products—such as transportation or infrastructure—those too are statutory costs that may be recovered if they increase during the emergency. This is a "robust, evidence-based cost-justification process."[260]

Similarly, the Consumer Brands Association claims that the rule as written "ignores business realities" by (it comments) omitting costs "rooted in improving sustainability, manufacturing, and other operational practices," citing the specific example of "increas[ing] the proportion of post-consumer recycled plastic in packaging from 40% to 60%" or "switch[ing] from an overseas supplier to a domestic supplier with better labor practices."[261] The Attorney General does not agree with this characterization of the cost rule. If, to use the CBA's example, a seller chose on January 2 to contract to change their toilet paper packaging, a blizzard hit on January 12, and the first bill for the new, more expensive toilet paper packaging came due on January 14, it would be appropriate for the seller to pass on that cost to consumers because the cost for the packaging is additional and outside the business's control since it flows from a pre-disruption contractual obligation adopted on a clear day.[262]

The statute forbids imposing on consumers a cost *within* the seller's control. If paying for different packaging was the (literal) price paid that was needed to be paid to purchase replacement supplies then such packaging costs would once again become statutory costs. For example, if a seller could only source replacement toilet paper that was sold in more expensive packaging than its usual stock, that increase in cost is a cost outside of its control that may be passed on in accordance with the replacement cost rule.

Details of Profit Margin-Related Proofs

The Business Council of New York and Food Industry Alliance of New York State commented that the proposed text of 600.9(g) did not clearly state whether the margin of

[260] *Ibid*.

[261] CBA, Second NPRM Comments at 44.

[262] This example presumes the seller accounts on a cash rather than accrual basis, but if the pre-disruption costs were accrued pre-disruption but cashflow considerations called for payment during the disruption in such a way that practically speaking costs increased during the disruption, this would be relevant to the costs analysis.

profit referenced the *proportion* of the income per unit that was profit or the absolute amount of profits per unit and suggested a clarification.[263]

The rule has been insubstantially amended to clarify that "margin" means proportion of income per unit rather than absolute amount of profit per unit, reflecting common business understanding of that term. A business is encouraged to increase the absolute amount of its profits without increasing profit margins, since this comes about only by maintaining price stability (after costs) while selling more of the essential product.

Lyft makes a related suggestion because the proposed rules "acknowledge that the prices of dynamically priced goods and services can substantially vary for reasons unrelated to the disruptive event. . . the affirmative defense [should] focus not on the profit margin for a single ride, but on the aggregate profit margin for all rides during the relevant time periods."[264] But if only those rides whose prices are "caused" by a disruption are within the statute's scope (a result the statute was carefully drafted to avoid by setting the condition of liability as "during" a disruption rather than "because of" a disruption),[265] then it would be highly inappropriate for the profits gained from those rides to be subsumed or detracted from by losses taken from non-gross-disparity rides. Under those circumstances, some customers would be gouged so other customers could be undercharged. That is not acceptable under the statute.

Moreover, Lyft's proposal is not consistent with the statute. The price gouging statute applies on a per-sale basis: "no party . . . shall sell or offer to sell *any* such goods or services or both" for an unlawful price, and a defense is available only if "the increase in *the* amount charged preserves *the* margin of profit that the defendant received for the same goods or services."[266] The profits or losses of one sale cannot be used to make up the profits or losses of another.

Index Pricing

The Food Industry Alliance of New York State proposed "the removal of the proposed limitations which prohibits the reliance on external indicies as a basis for increased costs."[267] A similar comment is made by API.[268] These comment appear to reference subdivision (e) of the proposed rule, which reads "[a] seller's use of an index price to price

[263] BCNYS, Second NPRM Comments at 29; FIA, Second NPRM Comments at 35.

[264] Lyft, Second NPRM Comments at 126-27. Uber makes a similar comment. Uber, Second NPRM Comments at 153-55.

[265] G.B.L. § 396-r(2)(a).

[266] *Ibid*.

[267] FIA, Second NPRM Comments at 34.

[268] API, Second NPRM Comments at 80.

their goods sold or value their inventory, or the existence of a customary or industry practice of employing an external index for pricing, shall not, *without more*, establish that an increase in the index price reflects an increase in seller's statutory costs."

API's comment is addressed above; the regulation does not exclude use of index prices. FIA argues that "actual delivery costs may not be available in real time . . . the retailer may have no other options except to rely on index prices to estimate what its actual delivered cost may be."[269] The Attorney General agrees that this concern has some force, but does not support the modification proposed. The objective of subdivision (e) is to signal to sellers that their "use" of index prices "or the existence of a customary or industry practice" of use of index prices without more does not establish that index prices equal costs.

The phrase "without more" is essential and addresses the commentators' concern. The "more" a seller must show is that the index price was the best of the available means of projecting *costs*. That is not *necessarily* the case for index priced goods, and that is why subdivision (e) is in place: to warn sellers that if they intend to rely on index prices they must supply the crucial link between index prices and the actual costs they incur.

Use of Existing Accounting Systems

The Consumer Brands Association argues that the rules as presently written would require that businesses depart from their usual and customary cost measurement tools to develop a bespoke cost calculation for determining costs for price gouging statute purposes,[270] and that any departure from generally accepted accounting practices (GAAP) would impose an undue burden on businesses.

It is the Attorney General's intention to allow businesses to use their existing GAAP bookkeeping practices to determine cost justification, to the maximum extent consistent with the statutory limitations on what constitutes a statutory cost. With the important exceptions of last-in, first-out accounting for fungible goods—which is approved by GAAP but not its international equivalent—and transfer prices, whose relationship to GAAP is itself notoriously complex, GAAP practices will satisfy the cost rule so long as the underlying cost is itself countable as a statutory cost.

The Attorney General agrees that cost apportionment between individual products may be challenging in an emergency setting. The rule accommodates these challenges by first deferring to the business's own cost apportionment practices if it has any (so long as they are adopted on a clear day), and then, for businesses without such practices, a menu of

[269] *Ibid*.

[270] CBA, Second NPRM Comments at 45.

options and a backstop permitting sellers to adopt a different system if nothing on the menu fits its circumstances. It is difficult to conceptualize—and CBA does not propose—a system that better "endow[s] sellers with the flexibility to respond" to disruptions.[271]

Fungible Costs

The API commented that the provision of the cost rule relating to fungible commodities "does not answer the question of which cost[s] are 'directly attributable' to a particular gallon [of refined products, presumably]."[272] The Attorney General disagrees. The rule defines directly attributable costs in subdivision (b)(2) as being the sum of exclusive and relevant overhead costs. The exclusive cost associated with the purchase of a gallon of gasoline is the cost of purchasing either that gallon or its replacement, which subdivision (f) provides is measured for fungible products of its kind using the first-in-first-out ("FIFO") valuation method, an international standard. The selection of a specific method of valuation is *precisely* the kind of intricate fill-in-the-details provision the Legislature intended when it gave the Attorney General the power to "effectuate and enforce the provisions of the price gouging statute."[273]

[271] *Id*.

[272] API, Second NPRM Comments at 81.

[273] G.B.L. § 396-r(5).

LAW-06-25-00011-P – Geographic Scope (proposed 13 N.Y.C.R.R. § 600.9)

Certain commentators expressed concerns respecting the practical, legal, and other effects of proposed rule 600.9, concerning the geographic extend of the statute.[274] The Attorney General has withdrawn proposed rule 600.9. The withdrawal of the rule does not foreclose future rulemaking activity on this topic, nor does it indicate agreement or disagreement with any comments regarding the rule.

[274] *See, e.g.*, BCNYS, Second NPRM Comments at 28; CBA, Second NPRM Comments at 45-46; AAM, Second NPRM Comments at 47-60; NYSHTA, Second NPRM Comments at 67-68.